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# ELEMENTS OF INDIAN COMPANY LAW'

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SOHRAB R. DAVAR, M. L. C.

BARRISTER-AT-LAW, ADVOCATE (I.S.)

*First Indian Lawyer of the Chartered Institute of Secretaries of Public Companies (London) and Incorporated Society of Accountants and Auditors (London) and time Member of the Syndicate, Fellow of the Senate and Member of the Board of Studies in Commerce of the University of Bombay. Past Government Professor of Mercantile Law and Business Organization in B.Com (Final) Fellow of the Chartered Institute of Secretaries, London. Member of the Government of India Committee for Companies Act Amendment, 1936. Author of a Manual of Indian Company Law, Practice, Forms and Procedures (in 2 Vols.) Indian Mercantile Law, Law of Meetings, Higher Accountancy Indian Company Law, etc., Founder and Principal of Davar's College of Commerce, Bombay.*

**FOURTH EDITION**

Published by

**THE PROGRESSIVE CORPORATION, LTD.**

PUBLISHERS, PUBLISHERS' AGENTS & BOOKSELLERS

Jehangir Wadia Building, Esplanade Road, Bombay

**1948**

**Price Rs. 10.**

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FIRST EDITION      1921

SECOND EDITION    1927

THIRD EDITION     1938

FOURTH EDITION    1948

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Printed By **MR. V. P. AGARWAL** at **GYAN PRESS, 8-10, Canal Cross Lane 4th**  
**Kalbadevi** and Published by **H. R. DAVAR, Managing Director**  
**THE PROGRESSIVE CORPORATION, LTD. Jehangir Wadia**  
**Building, 51, Esplanade Road, Bombay 1.**

## PREFACE TO FOURTH EDITION

This edition has been thoroughly revised and care has been taken to include the latest relevant case law as well as all important amendments made from time to time upto the date of going to press.

In order to make this edition of real help to students, the syllabuses and question papers of Indian as well as English examinations have been consulted in an attempt to cover every question likely to be asked. The difference between the English and the Indian law has been pointed out in greater detail and in order to save the student the labour and vexation of having to wade through the pages of each chapter in order to find the difference, English law, where it differs from the Indian law, is indicated by printing the words "English Law" or "In England" in deep black, so as to show the difference at a glance. The full text of the Indian Companies Act 1913 as amended to date has been appended as usual for ready reference. In order to facilitate revision of the subject near examination time all key words and phrases have been printed in deep black.

While this edition was in press, the Companies Act 1929 of England was considerably amended by the Companies Act 1947. A special note on the important changes, classified according to topic, is printed at the end of the book.

My endeavour, as always, has been to prepare an edition that can help the student world and the commercial public by presenting to them in a simple and lucid manner the law and procedure relating to companies both in India and in England. My only hope is that this edition over which so much care and thought has been lavished may prove to be of real help to those for whom it is intended.

In conclusion, I thank my daughter Khorshed D. P. Madon, LL.B., Advocate (O.S.), and Finalist of the Chartered Institute of Secretaries, London, and my son Rustom S. Davar, F.C.C.S., A.S.M.A., Barrister-at-Law, for the valuable help I have received from them in revising this book.

SOHRAB R. DAVAR

Davar's College of Commerce,  
51, Esplanade Road,  
Bombay.

*5th June 1948.*

## PREFACE TO THIRD EDITION

In the present edition the whole text had to be largely re-written in course of revision owing to the drastic amendments made by the Indian Companies (Amendment) Act of 1936. However, the old style and arrangements have been followed in order to maintain the great utility of this edition as the students' book for the professional examinations of Accountants, Auditors, Company Secretaries, as well as for students of the Degree course in Commerce of various Indian Universities. The case law has been augmented and a continuous reference to the English Act is made to point out where it agrees with our Indian Law and where it disagrees, for the benefit of students who appear both for the Indian and English examinations.

It is thus hoped that this students' text-book will meet with the same encouragement and support as heretofore, both from the commercial public and the students of Commerce and Law who may be in need of a handy book on the subject where the principles are expounded in a simple and easy style. The Company Secretary, the Managing Agent, the Director, the Professional Accountant and Lawyer, as well as all those who have to deal frequently with problems of Company Law and Practice would, it is submitted find this book handy for ready reference, though of course, where they wish a more elaborate and detailed exposition, the Author's "Indian Companies Manual of Law and Practice, including Forms and Precedents" in two volumes, will be found to be the more appropriate. The full text of the Indian Companies Act of 1913 with all amendments up-to-date is also appended for ready reference.

SOHRAB R. DAVAR

DAVAR'S COLLEGE,

*Bombay, 1st October, 1938.*

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**COMPARATIVE TABLE**  
**OF**  
**Sections of the Indian Companies Act, 1913**  
**WITH**  
**THE OLD ENGLISH COMPANIES (CONSOLIDATION)**  
**ACT OF 1908, AND THE PRESENT ENGLISH**  
**COMPANIES ACT, 1929**

Sections of the Indian Companies Act 1913, Amended up to 1936	Corresponding Section of the English Companies (Consolidation) Act 1908	Corresponding Section of the English Companies Act of 1929
Section	Section	Section
1	295, 296	385
(1), (7), (10), (12), (14), (16)	285	380
2 (1)	108 (5)	131 (3)
3 (1), (2)	121 (1), (2)	26
(3)	151 (7)	136
	1 (1)	57
	1 (2)	58
	2	1
		2
7	1 (1)	2 (1), (2)
	1 (2)	2 (3)
	5	2 (1), (2)
9 (Modified, 1936)	6	3 (Without modifications of Ind Act, 1936)
10 ( " )	7	4 ( " do )
11 ( " )	8 (1)	17
	8 (2)	19 (2), (3), (4), (5)
12 ( " )	9	5
13	9 (4)	5 (4)
14	9 (5)	5 (5)
15	9 (6)	5 (6)
16		
17	10 (1), (2)	6
	10 (3), (4)	8 (1)
18 (Modified, 1936)	11	8 (2)
19	12	9

## COMPARATIVE TABLE

Sections of the Indian Companies Act, 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
20	1 (1) 13 (2)	10 319 (2)
20A (New Section added)		22
21	14	20
22	15	12
23	16	13
24	17	15
25 (Slightly modified 1936)	18 19	23 11
25A (Newly added)		21
26	20	18
27	21	21
28	22	12
29	2	68
30	24	25
31	25	95
31A (Newly added)		36
32 (Considerably modified in 1936)	26 (1) (2) 28 (4) (5)	108 110 111
33	27	101
34 (Considerably modified 1936)	28	65
35	29	64
36 (Modified 1936)	31	95
38	32 (4)	
39 (Slightly modified 1936)	33	100
40	34	102
41	35	103
42	36	104
42		105
43 (Slightly Modified in 1936)	37 (1)	
44	37 (2)	70
45	37 (3)	97 (2)
46	37 (4)	70, 141 (2)
47	37 (5)	97 (1)
48	37 (6)	97 (4)
	38	71
49	39	48
	40	
50 (Slightly modified 1936)	41	50
51	42	51

# COMPARATIVE TABLE

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Sections of the Indian Companies Act 1913 amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act, 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
52	43	52, 55
53 (Slightly modified, 1936)	44	7, 52, 96
54	45	
54A (New Section 1936)		
55	46	55
56	47	56 (1)
57	48	
58	49	
59	49 (1)	56 (2)
60	50	57
61	51	
62	52	55
63	53	58
64	54	60
65	55	57 (2b)
66	56	50, 55
66A (New Section 1936)		61
67	57	16
68	58	53
69	59	49
70	60	146
71 (Slightly modified, 1936)	61 (2)	147
72 (Considerably modified, 1936)	62	52
73	63	
74	63 (2)	53
75		
76 (Considerably modified, 1936)	64	112
77 ( " )	65	113
	65 (3)	171
78 (Slightly modified, 1936)	66	114
79	67	115
80	68	116
81 (Considerably modified, 1936)	69	117
82 (Slightly modified, 1936)	70	118
83 (Considerably modified, 1936)	71	120
83A (Modified, 1936)		
83B ( " )		



## COMPARATIVE TABLE

Sections of the Indian Companies Act 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
84 (Modified 1936)	72	140
85	73	141
86	74	142
86A		142 (1)
86B		143
86C (New Sections)		152
86D		
86E		
86F		
86G	New Sections	
86H		
86I		
87 (Redrafted 1936)		144
87A		
87B		
87C		
87D		
87E	New Sections	
87F		
87G		
87H		
87I		
88	76	29
89	77	30
90	78	31
91	79	32
91A (Slightly modified 1936)		
91B ( )		
91C ( )		
91D ( )		
92	80	34
93 (Considerably modified, 1936)	81	
94	81 (2)	
95	81 (3)	25 55
96 (Modified, 1936)	81 (4)	
97 (Considerably modified 1936)	81 (6)	
98	82	40
93A (New Section, 1936)		38
99	83	36
100	84	37
101 (Considerably modified, 1936)	85	39

# COMPARATIVE TABLE

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Sections of the Indian Companies Act 1913 Amended up to 1936	* Corresponding Sections of the English Companies (Consolidation) Act, 1908	Corresponding Section of the English Companies Act of 1929
Section	Section	Section
102 (Slightly modified 1936)	86	41
103	87	41
104	88	42
105	89	43
106 (New Section 1936)		47
107 ( )		46
108 ( )		
109	90	44
110	91	45
111	92	67
112	93	
113 (New Section 1936)		70 80 (1) (2) 81 82, (1) (3) 82 (1) 84
114	94 (1)	
115	94 (1)	
116	94 (2)	
117	94 (3)	
118	94 (4)	82
119	94 (5)	
120	94 (6)	71 80 (1) (2) 82 (1), (1) 83, (1) 87
121	94 (7)	
122	94 (8)	
123 (Slightly modified 1936)	94	86
124 (Slightly modified 1936)	95	80
125 ( )	96	81
126 (Modified 1936)	97	84
127 (Modified 1936)	99	80 8
128 (Slightly modified 1936)	100	88
129	101	89
130	102	73
131	103	74
132	104	71
133	105	76
134	106	77
135	107	122
136 (Modified 1936)		123 (Partially)
137 (1)		
138 (2) (Slightly modified 1936)	113 (3)	129, 130
139 (New Section 1936)		123 (2)
140	26 (3)	121

## COMPARATIVE TABLE

Sections of the Indian Companies Act 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation Act, 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
132A (New Section 1936)		126 (Considerably modified).
133 (1)	113 (5b)	129
133 (2)		
133 (3)	113 (4)	129 (4)
134	26 (4)	110
135 (Slightly modified 1936)	113 (1)	129 (1)
136 ( " )	108	131
137 (Considerably modified 1936)		
138	109	
139	109 (2)	130
140	109 (3)	
141	109 (6)	
141A (New Section 1936)		Based on 136
142	110	137
143	111	138
143 (3) <i>et seq.</i> (Slightly modified 1936)	112 ( )	
	(1) (7)	132
	113 (1) (2) (4)	133
143 (Modified 1936)	11	129 130
	11 (1) (2) (3)	134
146 ( " )	114	130
147	115	28
148	116	370
149		
150	117	33
151	118	11, 14 108 379
152	119	
153 (Considerably modified 1936)	120	153
153A (New Section)		154
153B (New Section 1936)		155
154 (Redrafted 1936)	121 (2)	27
155	122	156
156	123	
157	123 (2)	157
158	124	158
159 (Modified, 1936)	125	159
160 ( " )	126	160

# COMPARATIVE TABLE

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Sections of the Indian Companies Act 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
101	127	161
102	128	162
103 (Modified 1916)	129	168
104	130	169
105		
106	131 (1) (7)	16
107	132	164
108	133	165
109	134	
110 (Modified 1916)	135	167
111	136	170
112	137	178
113	138	175
114	139	172
115	140	171
116 (Modified 1916)	141	174
117	142	
118A (New Section)		171
119 (Modified 1916)	143	202
120	144	258
121	145	179
122	146	181
123	147	182
124	148	
125 (Slightly modified 1916)	149 (1)	183
	149 (2), (3) (31)	184
	149 (3b) (7) (9a)	185
	149 (3c) (6)	186 188
	149 (4)	188 (4)
	149 (8)	188 (2)
170 ( )	149 (9)	187
171		181
172A (New Section)		182
173B ( )		189
174 (Modified 1936)	150	190
175A (New Section 1936)		191
176	151	184 (4)
177	151 (5)	191 (1) (c)
178	151 (1), (c)	
179	161 (1d) ...	185, 198
180	152 (1), (1b), (2), (3)	186
181	152 (1)---(4), (b)	186
	153	194
	154	195
	155	193, 194
182 (Modified, 1936)	156	197
	157	

## COMPARATIVE TABLE

Sections of the Indian Companies Act, 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
185 (Modified 1936)	158 159 160 (1) (2) 160 (3) 161 162 163 164	192 193 194 200 201 202 203 204
184	164	204
185	165 (1)	205
186	166 (1)	206
187		
188 (Slightly modified 1936)	167	
	167 (2)	207
189 ( " )		
190	168	
191	169	208
192	170	210
193	171	211
194	172	212
195	173	221
196	174	220
197	175	214
198	176	215
199	177	218
200	179 (1) (2)	219
201	179	220
202	180 (2)	222
203 (Slightly modified, 1936)	180 (3)	
204	181 (2)—4	22
205 (Slightly modified 1936)	182	224
206	183	225
207 (Redrafted 1936)	184	
208 (Redrafted, 1936)	185	227
208A (New Section 1936)		228
208B ( " )	187	229
208C ( " )		
		230 255 inclusive

# COMPARATIVE TABLE

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Sections of the Indian Companies Act 1913 Amended up to 1930	Corresponding Sections of the Finnish Companies (Consolidation) Act, 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
208D (New Section 1936)	188	202 to 205 inclusive
208E ( " " )		
209 (Repealed 1936)		
209A (New Section 1936)		
209B ( " )		
209C ( " )		
209D ( " )		
209E ( " )		
209F ( " )		
209G ( " )		
209H ( " )	189	255
210 (Repealed 1936)		
211 ( " )		
212 ( " )		
213 ( " )		
214 ( " )		
215 ( " )		
216 ( " )		
217 ( " )		
218 ( " )		
219 (Omitted 1936)	197	256
220	198	257
221	199	258
222	200	259
223	201	260
224	202	261 (3)
225	203	262, 258
226	204	263
227	205	264
228	206	265
229	207	266
230 (Modified 1936)	208	267
230A (New Section 1936)	209	
231	210	
232 (Slightly modified, 1936)	211	268
233	212	269
	213	270
234	214	271, 248, 260
235 (Modified 1936)	215	272

## COMPARATIVE TABLE

Sections of the Indian Companies Act, 1913. Amended up to 1936.	Corresponding Sections of the English Companies (Consolidation) Act, 1908.	Corresponding Sections of the English Companies Act of 1929.
Section.	Section.	Section.
236 ...	216 ...	272
237 (Redrafted, 1936) ...	217 ...	277
238 ...	218 ...	363
238A (New Section, 1936) ...	219 ...	271
239 ...	220 ...	288
240 ...	221 ...	282
241 ...	222 ...	212
242 ...	223 ...	283
243 ...	224 ...	294
244 (Modified, 1936) ...	224 (4)—(7) ...	284
	225 ...	285
	226 ...	289
	227 ...	290
		291
244A (New Section, 1936) ...	...	194
245 ...	228 ...	293
246 (Slightly modified, 1936) ...	173 ...	220
	229 ...	300
	230 ...	301
	231 ...	302
	232 ...	...
	233 ...	303
	234 ...	...
	235 ...	304
	236 ...	378
	237 ...	305
	238 ...	374
	239 ...	297
	240 ...	298
	241 ...	299
247 ...	242 ...	295
248 ...	243 (1)—(5), (8) ...	312, 314
249 ...	243 (6) (7) ...	...
249A (New Section, 1936) ...	244 ...	313
	...	315
250 ...	245 ...	316
251 ...	246 ...	317
	247 ...	318
252 ...	248 ...	319
253 ...	249 ...	321
254 ...	250 ...	322
	251 ...	360
255 ...	252 ...	323

## COMPARATIVE TABLE

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Sections of the Indian Companies Act, 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act, 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11	11	11
12	12	12
13	13	13
14	14	14
15	15	15
16	16	16
17	17	17
18	18	18
19	19	19
20	20	20
21 (Modified 1936)	21	21
22	22	22
23	23	23
24	24	24
25	25	25
26	26	26
27	27	27
28	28	28
29	29	29
30	30	30
31	31	31
32	32	32
33	33	33
34	34	34
35	35	35
36	36	36
37	37	37
38	38	38
39	39	39
40	40	40
41	41	41
42	42	42
43	43	43
44	44	44
45	45	45
46	46	46
47	47	47
48	48	48
49	49	49
50	50	50
51	51	51
52	52	52
53	53	53
54	54	54
55	55	55
56	56	56
57	57	57
58	58	58
59	59	59
60	60	60
61	61	61
62	62	62
63	63	63
64	64	64
65	65	65
66	66	66
67	67	67
68	68	68
69	69	69
70	70	70
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97	97	97
98	98	98
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## COMPARATIVE TABLE

Sections of the Indian Companies Act, 1913 Amended up to 1936	Corresponding Sections of the English Companies (Consolidation) Act 1908	Corresponding Sections of the English Companies Act of 1929
Section	Section	Section
281 (Redrafted 1936)	279	72
282	280	375
282A (New Section 1936)	281	362
282B ( )		
283	282	464
	283	371
	284	377
	285	50
	286	
	287	
284		353
285	288	
286	289	
287	290	
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289		
290	286	

# ELEMENTS OF INDIAN COMPANY LAW

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## CHAPTER I. INTRODUCTION.

### **Early History.**

Joint stock companies originated in England with the idea of raising loans for financing the Government and securing in return some monopolies or special privileges for themselves. The original **East India Company was established in 1600 A.D.**, by the grant of a **Charter** by Queen Elizabeth. Its business was that of financing the Government with the carrying on of its own trade. The **Hudson Bay Company was founded in 1670 A.D.**, under a Royal Charter. **The Bank of England was established in 1694 A.D.**, under a Royal Charter to finance the Government of William III. These companies were all formed either through the grant of a Royal Charter, or by incorporation under a special Act of Parliament. The mode of **incorporation under the ordinary Companies Act**, so familiar to us in these days, was not **introduced until 1844**. Incorporation on the **limited liability** principle was not allowed until the year **1855**. In **1862** the **Company Law of England was properly codified**, and during subsequent years frequently modified. In the year 1908, however, a consolidating Act was passed called the **Companies (Consolidation) Act of 1908**, which practically represents the present day Company Law of India (with slight amendments) represented by the Indian Companies Act of 1913.

In the year **1929**, a new **Companies Act** was passed in **England** which came into operation on 1st November 1929. This Act was a consolidating measure which incorporates the provisions of the Act of 1908 which this new Act repeals.

**In India** the Acts passed from time to time may be briefly stated as follows :—

Joint Stock Companies Act	1859 (Repealed by Act of 1866)	
Do.	Do.	1857 Do.
Joint Stock Banks Act	1860	Do.
Companies Act	1866 (Repealed by Act of 1882)	
Do.	1882 (Repealed by Act of 1913)	
Companies Amendment Act	1887	Do.
Companies (Memorandum of Association) Act	1895	Do.
Companies (Branch Registers) Act	1900	Do.
Companies Amendment Act	1910	Do.
Indian Companies Act	1913 Amended by the Acts of 1914, 1920, 1930, 1932.	
Indian Companies (Amendment) Act	1936 further amended by Acts of 1937, 1938, 1939, 1940, 1942, 1944 & 1946.	

### **Indian Companies (Amendment) Act, 1936.**

The Act of 1882 was practically speaking the standard Act for India, of course with amendments indicated above, until its repeal by the Act of 1913. The object with which the Act of 1913 was passed was "to consolidate and amend the law relating to Trading Companies and other Associations." In the drafting of this Indian Act of 1913, the English Act of 1908, has no doubt been taken as the model, and sections of it are bodily incorporated in the Indian Act. The Act of 1913, however, thus consolidated is a drastic amendment of the Indian Companies Act as in force at

the time particularly by way of additions, as the latter had fallen quite behind the times owing to the rapid strides made by company legislation in England during the intervening years. Besides incorporating the various sections of the English Act of 1908, with additions and alterations, our Indian Act includes provisions which distinctly carry it a step in advance of its English contemporary, particularly in regard to provisions for the order of inspection into the affairs of the company by the Local Government at the instance of the shareholders, where, in the opinion of the Registrar of Companies, a sufficient case has been made out for it and also as regards the qualification of auditors.

The Indian company organisation recorded a rapid progress between the years 1913 and 1936, and the demand for bringing the Indian Companies Act up-to-date through amendments brought about after careful investigation of the question became more persistent, with the result that the amendment of the Act was taken in hand in the year 1936. After the investigation of the problems first through a Special Law Officer appointed for the purpose and later through a careful survey of the whole problem from a purely Indian standpoint by a Special Committee appointed by the Government of India which was representative of all interests, the Draft Bill was introduced and passed in the two Houses. The new Bill which is known as the Indian Companies (Amendment) Act of 1936, makes substantial alterations and additions to the old Act of 1913. For the first time in the history of Indian company legislation the managing agent has been defined and his powers, as well as limitations, provided for within its sections. The subsidiary and parent companies are now defined and their organisation and working are brought within the purview of the Act by relevant sections which in some particulars happen to go further even than the sister English legislation in view of the experience of the working of that legislation since the year 1929 when the English Act was passed. The Law applying to the meetings of shareholders or members has also received careful consideration in the course of these amendments. There is also a

well-thought-out alteration of the law applying to the formation and working of the Boards of Directors and their constitution. The minimum subscription is now placed on more or less similar basis to the English Act of 1929. In connection with account-keeping also it is now made compulsory to circulate a profit and loss account displaying certain specified items of revenue and expenditure along with the balance sheet and the directors' report as to the state of the company's affairs before the periodical meetings of the company, as provided for in Sec. 131. Form F of the balance sheet has also been considerably modified.

Voluntary winding up is now divided into two divisions, *viz.*, members' voluntary winding up and creditors' voluntary winding up, more or less along the lines of the English Act of 1929 and the old Act has been considerably modified in this connection.

Banking companies are now given a special chapter in the Act embracing special sections applying to joint stock companies doing banking business in India. A banking company has now been elaborately defined in a special section.

All round speaking, the new Amending Act of 1936 has considerably modified the old legislation and is bound to exercise a very healthy influence on the Indian company organisation of the future and check if not absolutely eradicate various abuses which had become so notorious under our company system of management.

There are, of course, companies specially formed by or under special Acts of Parliament in England, or under the special Acts of the Councils in India. Besides, there are Acts specially applying to special classes of companies such as railway or life insurance companies. The object of this treatise, however, is to restrict itself to the treatment of the law bearing on companies formed under the Indian Companies Act of 1913 and at the same time to show where our present Act differs from the English sister legislation for the benefit of those who are interested in both these branches of law.

## Prohibition of Large Partnerships.

Prior to the passing of the English Act of 1862, large partnerships used to be formed known as "unincorporated companies." Such companies cannot now exist in England as the modern Acts make it **compulsory for all partnerships** made up of **more than ten persons carrying on banking business, or more than twenty carrying on trading business, to be incorporated under the Companies Act.** In the absence of such incorporation they would be classed as **illegal associations** in law with the result that they cannot in England sue, or be sued for debts owing to or by them.

**Our Indian Companies (Amendment) Act 1936**, however, has made certain important alterations in this branch of law which now places it on a different footing from that of the corresponding section of the English Companies Act of 1929. The amended section runs as follows :—

- S. 4 (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian Law, or of Royal Charter or Letters Patent.
- (2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian Law or of Royal Charter or Letters Patent.
- (3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.
- (4) Every member of a company, association or partnership carrying on business in contravention of this section, shall be personally liable for all liabilities incurred in such business. ✓

- (5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.

In the above Sec. 4, sub-sections (3), (4) and (5) have been added by the Amending Act of 1936 in our present Companies Act of 1913. It will be noticed here that now Sec. 4 shall not apply to a joint family carrying on joint family trade or business. It will be noticed from the construction that the said joint family may be a Hindu, Mohammedan, Parsi or any other communal family. If however two or more joint families form a partnership, in computing the number of persons for the purposes of this section minor members of such families shall be excluded. This means that where two or more trading families form a partnership the limitation as to membership as provided for in Sec. 4 will apply but with the reservation that minor members of such families shall be excluded in the computation of this number. This section of course does not apply to associations not carrying on any business for gain, such as literary associations. It however applies to mutual benefit societies and loan societies. The present Act further alters the position at law by enacting that every member of the company, association or partnership carrying on business in contravention of this section shall be personally liable for all the liabilities incurred by such companies. Besides this it lays down that any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding Rs. 1,000.

### **Companies and Partnerships.**

The points of **difference** between joint stock companies and partnerships may be summed up as follows :--

1. A partnership may not comprise of more than ten members in a banking firm, or more than twenty members in a trading firm, whereas in case of a company, any **number of members** not less

than seven can get themselves incorporated into a company under the Act.

2. The law does not recognise the firm as a person distinct from persons who compose it, e.g. if A, B and C carry on business as Robins & Co., this firm's name will not be recognised as a distinct entity, but each member will have to be named. The full designation in law in case of such a firm will be "A, B and C" carrying on business under the name and style of Robins & Co. Each partner thus lays himself open to be sued by the creditors of the firm, and his private property is open to attachment for the debts of the firm. In case of a company, however, the company on incorporation attains the status of an artificial person created by law with a perpetual succession and a common seal, which is the official signature of the company. A company is a distinct legal person or *persona*. The separate personality of a company & its entity as distinct from its shareholders was established by the House of Lords in *Salomon v. Salomon & Co.*, (1897) A.C. 22, where it was held that however large the proportion of the shares & debentures owned by one man, even if the other shares were held in trust for him, the company's acts were not his acts nor were its liabilities his liabilities. This is so even where he also has sole control of the company's affairs as governing director. The private property of members (commonly known as shareholders) is not liable to be attached by a creditor of the company, nor is he liable to be sued personally for the payment of the debts of the company.

3. Another peculiarity in the case of a company is the facility it offers with regard to the **transferability** of its shares. Thus a shareholder in a company can transfer his share or shares without consulting and obtaining the consent of the other shareholders, whereas in case of a partnership, no partner can bring in a new partner in his place, or otherwise, without the unanimous consent of all the other partners.

4. As a partnership has no legal existence apart from the members who compose it, **every partner** (subject to an agreement



to the contrary) is an **agent of the firm** and his other partners for the purpose of entering into contracts in the regular course of business of the firm.

5. Every partner is liable to his last penny for the payment of the debts of the firm of which he is a partner, in other words, the **liability of partners, is unlimited**. In the case of a company, however, by its being registered as a limited company, the liability of shareholders is limited to the nominal amount of shares they have taken up.

6. The **business** of a Company is **restricted** to the objects set forth in the Memorandum of Association unless legal formalities are gone through and order of the court is obtained. In case of a partnership the partners can by agreement undertake any business.

### **Companies and Societies.**

There is no proper decision exactly defining a company and distinguishing it from a society. The Act in Sec. 2 (2) defines a company to mean one formed and registered under the Indian Companies Act, 1913. Vaughan Williams, J. in *Great Northern Co. V. Coal Co-operative Society*, 1896, 1 Ch. D. 191 states that the word "company" has come to have a very well-recognised meaning. There are various legal companies but this industrial society does not come within the connotation of the word in any of its accepted legal meanings. However, the members of an illegal association are individually liable for any orders given or contracts made by them personally. An officer or employee of the association can be prosecuted for embezzeling the funds of the society. (*R. V. Tankard*, 1894, 1 Q.B. 548).

### **Object sought to be attained by the Acts.**

The object with which the early, as well as the current Company Acts were passed, was to regularise the work of large trading associations composed of a large number of partners with varying interest, particularly to give due protection to the public

who have to deal with this class of associations, either as shareholders or creditors, and thus to give a sort of encouragement or impetus to the spread of joint stock enterprises, which are now acknowledged all over the world to be the best medium for expanding industries and for encouraging thrift with a view to the increase of national capital. As per James L. J. in *Smith V. Anderson*, 15 Ch. D. 273 "The Act (meaning the Act of 1862) was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and were put to great difficulty and expense which was a public mischief to be repressed."

### Types of Companies.

A Company may be formed as (1) a company **limited by shares**, i.e., a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them, S. 5(1), or (2) a company **limited by guarantee**, i.e., a company having the liability of its members limited by its memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up, or (3) a company with **unlimited liability**, i.e., a company not having any limitation on the liability of its members. The last two types of companies may be incorporated or registered with or without share capital.

### Statutory Companies.

"Statutory companies" is a name applied to companies which are brought into existence by a **Special Act of Parliament or of the Legislative Assembly**. Thus we have, as an illustration, the Imperial and Reserve Banks of India which are two of our Statutory companies, being incorporated under a Special Act of the Legislative Assembly. These Statutory companies are not governed by the Indian Companies Act, 1913, but the Act by which they are formed governs their whole constitution, and also

frequently embraces rules and regulations by which the corporation is to be controlled as far as internal regulations are concerned and also lays down the method by which they may be altered.

### **Public and Private Companies.**

We shall later set in detail as to how companies can be formed either as (1) private companies, or (2) public companies. In case of private companies, they have to be composed of not less than two members nor more than fifty, not including persons who are in the employ of the company, S. 13. Whereas in case of public companies, all that the law requires is that there shall be at least seven members and there is no restriction as to the maximum.

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## CHAPTER II.

### FORMATION AND REGISTRATION OF COMPANIES.

A joint stock company may be formed either with a view to take over and expand an old established concern, or to float an entirely new enterprise. In either case, certain persons commonly known as promoters or founders, generally take over the work of conceiving the project, advertising it through the prospectus, and generally speaking, taking initial steps necessary to ensure the financial success of the undertaking. In modern times one joint stock company may promote another, provided the constitution of such companies provides the necessary powers. A company comes into existence on its incorporation. It is thus said to be an "artificial person" created by law with a perpetual succession and a common seal.

### PRIVATE AND PUBLIC COMPANIES.

A joint stock company may be incorporated under the Act of 1913 either **as a private or a public company**. We shall deal with the peculiarities of a private company at some length in a separate chapter, but for the present it may be remarked that such a company restricts by its articles the right to transfer the shares if any and limits the number of its members to fifty (not including persons who are in the employment of the the company) and prohibits any invitation to the public to subscribe for the shares if any or debentures of the company if any; provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member. Sec. 2 (13).

The English definition of a private company is a little different now from that of our Indian Companies Act in view of the amendments made in 1936. The **English definition** is as follows :—

Sec. 26(1). For the purposes of this Act, the expression "private company" means a company which by its articles—

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members of the company; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2) Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member.

**A public company**, on the other hand, offers its shares to the public and advertises them through a prospectus. It may or may not impose any restrictions on the transfer of its shares, and there is no particular limit, as far as the maximum is concerned, to the number of members it may be composed of.

For the purpose of incorporation it may be roughly stated that any two or more persons, not exceeding fifty, not including the persons in the employ of the proposed association associated for a lawful purpose, may get themselves incorporated as a **private company**. In case of a public company, any seven or more persons associated for a lawful purpose, can get themselves incorporated into a public company. In both these cases a document known as the memorandum of association will have to be made out to which at least two members, in case of a private company and at least seven in case of a public company, shall subscribe their names. The company thus formed may fall under one of the following three classes :—

- (1) A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed **a company limited by shares**).
  - (2) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company, in the event of its being wound up (in this Act termed **a company limited by guarantee**).
  - (3) A company not having any limit on the liability of its members (in this Act termed an **unlimited company**.)
- Sec. 5 (i), (ii) and (iii).

### **Preliminaries of Incorporation.**

Parties applying to the registrar for the registration of a company, must **file with the registrar** of joint stock companies for the province in which the Registered office of the company is stated by the memorandum to be situate, the following :—

- (1) The **memorandum** of association signed by each subscriber in the presence of at least one witness who shall attest the signature. (Sec. 9).
- (2) The **articles** of association (except where Table A is adopted as the company's articles). These articles are to be divided in the form of paragraphs printed and signed by each subscriber to the memorandum of association, each such signature being attested by at least one witness. (Secs. 17 and 18).
- (3) A **list of** persons who have consented to be **directors** of the company, unless the registration is applied for on behalf of a private company, when this rule will not apply.
- (4) A **consent in writing** of each director appointed by the company to act as director, unless the company is a private company (Sec. 84).

- (5) A **statutory declaration** by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of the company, or by a person named in the articles as a director, manager or secretary of the company, that all the requirements as to registration have been complied with [S. 24(2)].

In the case of **foreign companies** *i.e.*, companies incorporated outside British India but having a place of business within British India, the following must be filed with the registrar :—

- (1) A certified copy of the charter, statute or memorandum and articles.
- (2) A list of directors.
- (3) The full address of the registered or principal office of the company.
- (4) The name of the person on whom process may be served (Sec. 277).

### **Certificate of Incorporation.**

When the proper documents are thus filed with the registrar of joint stock companies and the requisite fee duly paid, the registrar issues a certificate known as the "certificate of incorporation". This certificate, according to Sec. 24, shall be **conclusive evidence** that all the requirements of the Indian Companies Act, 1913, in respect of registration and all matters precedent and incidental thereto have been complied with and that the association, as a company, is authorised to be registered and duly registered under this Act. The certificate of the registrar is **conclusive** that the terms of the memorandum are within the law and thus the only thing that the Court can do is to construe the memorandum as it stands. (*Cotman V. Brougham*, 1918, A.C. 514). On the question of conclusiveness of the certificate of incorporation see Lord Cairn's judgment at page 682 in *Peel's Case*, 1867, 2 Ch. Ap. 674. The certificate is conclusive also that the company came into existence on the date of the certificate and was in existence for

the whole of the said day. *Jubilee Cotton Mills, V. Lewis*, 1924, A.C. 958). Mr. Palmer, in "Palmer's Company Precedents" states as follows :—"Looking to the decisions and to the section, it is clear that there is no further room for questioning even if the seven signatures to a memorandum were all written by one person, or were all forged, the certificate would be conclusive evidence that the company was duly incorporated." This is so even when conditions of registration were not duly complied with. (*Moosa Goolam Ariff V. Ebrahim Goolam Ariff*, 1913, 40 Cal. 1; 1912, 14 Bom. L.R. 1211). So too, if the signatories were all infants, the certificates would be conclusive, whether the remarkable decision in *Laxon & Co.*, 1892, 3 Ch. 555 that an infant is a "person" within Sec. 6, can or cannot be supported."

It may be added that the **Act contains no provisions for giving the Court power to annul a certificate of incorporation and disincorporate a company which has already been registered.** It may however be noted that in *Bowman V. Secular Society Ltd.*, 1917, A.C. 406, Lord Parker of Waddington, in the course of his judgment, stated that in case where the company was improperly registered, the Attorney General on behalf of the Crown could institute proceedings by way of *certiorari* to cancel a registration with the registrar. The actual wording of his Lordship was :—

Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it will be open to the Court to stay its hand until an opportunity had been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that the Companies Act is not so express as to bind the Crown, and the Attorney General on behalf of the Crown, could institute proceedings by way of *certiorari* to cancel a registration which the registrar in discharge of his quasi-judicial duties had improperly allowed.

Thus his Lordship thought that the Attorney General on behalf of the Crown could take action in such a case.

From the date of the incorporation mentioned in this "certificate of incorporation", the subscribers to the memorandum



together with such other persons who may from time to time become members of the company will appear in the eyes of law "**a body corporate**" under the name selected by its promoters and as stated in the memorandum of association. This body shall be capable of exercising all the functions of incorporated companies having **a perpetual succession** and a **common seal**. (Sec. 23). The principles of the law of agency apply in case of a corporation or a company as in case of a private individual. (*Houldsworth v. City of Glasgow Bank and Liquidators*, 5 A.C. 317, see p. 326).

### THE PROMOTERS.

A company is generally brought into existence by a person or a number of persons who are commonly known as "promoters."

The **promoter is defined** or rather described in Sec. 100 (5) (a) as one "who was a party to the preparation of the prospectus, or the portion thereof ... but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company."

The term "promoter" has also been defined by various learned judges in different languages.

*Bowen L. J.* defines promoter as "the term promoter is a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world by which a company is generally brought into existence." (*Whaley Bridge Printing Co. v. Green*, 1880, 5 Q.B.D. 109). Another eminent judge, *viz.*, *Cockburn C. J.*, lays down that he is one who "undertakes to form a company with reference to a given project and to set it going and to take the necessary steps to accomplish that purpose". (*Twycross v. Grant*, 1877, 2 C.P.D. 469 at p. 507).

The **gist of all the definitions** is to the effect that any individual, syndicate, association or partnership, etc., which puts into motion a machinery by which a company is brought into existence, may be described by that designation. It should,

however, be noted that persons who act merely in any professional capacity, e.g., the solicitor, banker, clerks, etc., are not promoters.

These promoters generally (1) get the original documents like the memorandum and the articles, as well as the prospectus, prepared, (2) take an active part in the selection of directors, and (3) in the purchase of some property by the company for the purpose of carrying on its proposed business, and (4) generally speaking, float or assist in floating, a company, or do any one or more of these operations. Mr Palmer divides promoters into three classes, viz. : (1) **professional** promoters, (2) **occasional** promoters, and (3) promoters "*pro hac vice*." The first are those who make a business or profession of promoting a company, whereas the second do this occasionally as a part of the business. The third, however, are those who do not fall in either of the first two classes named above, but who take part in the promotion of one particular enterprise in which they are directly interested, e.g., the investors of an invention forming a company to work that invention. All these promoters, no doubt, expect some benefit or profit through this promotion and as long as the remuneration is obtained in good faith, and with due disclosure, it could not be objected to at law. The **remuneration** may take the form either of the grant of fully, or partly paid shares, or of a lump sum, or the promoter may be the original purchaser of some property which he now arranges to sell to the company at a profit. As the promoter takes a prominent part in bringing the company into existence, he stands in a **fiduciary position towards the company**, and is thus expected to make a full and fair disclosure of the benefits accruing to him through the promotion. This disclosure is generally made in the prospectus of the company or in its memorandum or articles.

On this point the leading case is that of *Emile Erlanger v. The News Sombrers' Phosphate Co. and others*, 3 A.P. Cas. 1218, where Lord Cairne, expressed himself as follows — "They stand in my opinion, undoubtedly in a **fiduciary position**. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under

what supervision it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through the managing directors, the purchasers of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a Board of Directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote or form a joint stock company and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to this company through the medium of a **Board of Directors** who can and do exercise an independent and intelligent judgment on the transaction."

#### **PROMOTER COMPANIES.**

Frequently one company promotes another under the Indian Companies Act of 1913. There are occasions when a special promoting company with limited liability is formed by a syndicate with the specific object of forming some particular company. Here the promoters arrange to hold shares in the promoting company, but as soon as the company they projected to promote is floated, the promoting company is wound up and the net proceeds are distributed among the shareholders, *i.e.*, the members of the syndicate. This course is adopted with the **two-fold object** of concealing the identity of the promoters, and at the same time of protecting themselves against personal liability and other dangers. This object is effectively achieved as far as the civil liability is concerned, because shareholders of this promoting company are not personally liable for contracts made by the promoting company which as we have noticed is a limited company; but where this promoting company commits a breach of duty or fraud, the directors of such company are liable personally. On the same footing the

directors of this promoting company will be liable for not disclosing profits made by the promoting company in the prospectus because that course is tantamount to a breach of trust or fraud. (*Emma Mining Co. v. Grant*, 1881, 17 Ch. D. 122; *Barnes v. Addy*, 9 Ch. D. 244). If, however, this syndicate of promoting company formed to promote had made **illicit profits** from the company so promoted they could be followed even in the hands of members of the promoting Company.

*In re. Brazilian Rubber Plantation and Estates Ltd.*, 1911, 1 Ch. D. 425 as per *Neville J*, "The company, until in the hands of its own board, is but the creature of the promoters, unable to consider its own interest or act on its own behalf." (See also *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 919—939; *Omnium Electric P. Ltd. v. Barnes*, 1914, 1 Ch. D. 332).

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## CHAPTER III.

## MEMORANDUM OF ASSOCIATION.

**General Observations.**

Every joint stock company under the Indian Companies Act, 1913, must have a memorandum of association duly subscribed, on the registration of which the foundation of the company is based. It is thus said that the memorandum of association of a joint stock company is its **Charter** and as such the most important document in connection with the company concerned. It is therefore superfluous to state that great care should be taken in the drafting of this most important document. The registration of this memorandum of association as well as the articles of association bind the company as well as its members to the same extent as if they had signed the said document. The Companies Act has laid down conditions which are fundamental to the formation of the companies and the memorandum of association contains them; these conditions being alike for the benefit of the creditors and the outside public as for the shareholders. (*Guinness v. Land Corporation of Ireland* 1883, 22 Ch. D. 349). The **articles** of association with which we shall deal in a subsequent chapter, are on the other hand the **bye-laws** rules and regulations of the company which define the rights, privileges and duties of the company, of the persons managing the company and of its members. Thus it is said that **the memorandum is subordinate to the Indian Companies Act of 1913** and that **the articles are subordinate to the memorandum** as well as the Act. This means that there should be nothing in the memorandum which violates or departs from the law laid down by the Act, whereas the articles should be so framed that they are strictly within the purview of the memorandum as well as the Act. In other words, the articles cannot alter or modify the memorandum or the sections of the Act. A memorandum of association is **not a contract with third party** even if there is a clause incorporating such a contract in the memorandum. (*Ram-*

*krishna Potdar v. The Sholapur S. & W. Co. Ltd.*, 1934, Bom. L.R. 907).

In the case of a **company limited by shares** the memorandum shall state the following ;—

- (i) the **name** of the company with "limited" as the last word in its name;
  - (ii) the **province** in which the registered office of the company is to be situate;
  - (iii) the **objects** of the company,
  - (iv) that the **liability** of the members is limited;
  - (v) the amount of share **capital** with which the company proposes to be registered, and the division thereof into shares of a fixed amount.
- (Sec. 6).

In the case of a company **limited by guarantee** the memorandum is required to state the following—

- (i) the name of the company with "limited" as the last word in its name;
- (ii) the province in which the registered office of the company is to be situate;
- (iii) the objects of the company;
- (iv) that the liability of the members is limited;
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

if the company **has share capital**—

- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;
- (ii) no subscriber of the memorandum shall take less than one share;
- (iii) each subscriber shall write opposite to his name the number of shares he takes.

In the case of an **unlimited company** the memorandum shall state the following :—

- (i) the name of company;

- (ii) the province in which the registered office of the company is to be situate,
- (iii) the objects of the company,

if the company has a share capital—

- (i) no subscriber of the memorandum shall take less than one share,
- (ii) each subscriber shall write opposite to his name the number of shares he takes

### Signing of the Memorandum

This memorandum is required to be signed in case of a private company by at least two members, whereas in case of a public company by at least seven. The signature of each of the members so subscribing to the memorandum has also to be attested by a witness.

This subscription or signature shall be placed at the foot of the memorandum with the address and occupation of each signatory and the number of shares agreed to be taken by each opposite to each signature. These signatories have to sign in the presence of at least one witness who besides attesting the signatures must write his occupation and address. There is no objection to one witness attesting all the signatures provided he is not a subscriber to the memorandum himself. (*Seal v. Claridge*, 1881, 7 Q.B.D. 516). The memorandum must be stamped according to the requirements of the Indian Stamp Act of 1899 *plus* the increase, if any, laid down by the local Stamp Act of each province. The signatory may be an agent signing on behalf of the principal if he is properly authorised. (*Whitley Partners Ltd.*, 1886, 32 Ch. D. 337). A married or unmarried **woman** can be a subscriber. The usual practice is to state one share before the signatory's name, though the signatory may ultimately subscribe more. It makes no difference whether the persons subscribing the memorandum are independent persons or represent the same interest. (*Saloman v. Saloman*, 1897, A. C. 22). The subscribers to the memorandum of association become members of the company from the date of registration of the memorandum, Sec. 30 (1). A subscriber cannot after registration of the company repudiate his subscription on the ground

that he was made to sign under misrepresentation because at the time he subscribed the company was not in existence and thus it could be said that the company was a party to the misrepresentation of fraud. (*Metal Constituents Ltd., Lord Lurgan's case, 1902, 1 Ch. 707*).

We shall now take up each of the headings of the memorandum as stated above and deal separately with the important points connected with each.

### THE NAME OF THE COMPANY

The first point to be noted in connection with the name is that, it should **not be similar to, or identical with**, that of any existing company or so nearly resembling that name as to be calculated to deceive except when the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires, S. 11. The registrar will not register a company with a name identical with that of an existing company, and even where the name is so similar as to be calculated to deceive, the same result will follow.

Again where a company bears a name which is likely to lead others to believe that the company which is applying to be registered is carrying on the business of some existing firm or company, the registration shall be refused as the registrar has a discretion in the matter. The Court would not interfere by *mandamus* unless either the registrar had not in fact exercised any discretion in the particular case, or had exercised it upon some wrong principle of law, or had been influenced by extraneous considerations which he ought not to have taken into account. (*Rex v. Registrar of Companies, 1912, 3 K.B. 23*). Even if a company got itself registered by a misadventure with a similar name which resembled that of an existing company in the same line of business the old and the existing company can restrain the new company by an injunction from using the same name. (*Huntley & Palmer v. Reading Biscuit Co., 1892, 9 T.L.R. 462*). In case a



new company secures registration through some inadvertence, with a name or business which is likely to be mixed up with that of an existing company, the latter can by an injunction, restrain the new company from using such a name, or from being registered with such a name.

This rule will apply even though the name proposed happens to be the name of the most prominent member of the said company or association. Thus, in *Huntley & Palmer v. Reading Biscuit Company*, 1892, 9 T.L.R. 462, referred to above Messrs. Huntley succeeded in getting an injunction restraining the Reading Biscuit Company Limited from the using the word "Reading" in connection with their name, on the ground that it was likely to mislead the public in believing that the Reading Company was doing the business of Messrs. Huntley & Palmer, inasmuch as, the word "Reading" was prominently used in connection with the biscuits of Messrs. Huntley & Palmer. In another leading case on the point, namely that of *Madame Tussaud and Sons v. Tussaud*, 1890, 44 Ch. D. 670, Mr. Louis Tussaud was prevented from registering the company for the purpose of carrying on a wax works exhibition business under his own name, namely, that of Louis Tussaud Limited, mainly on the ground that even though this was the personal name of a prominent member of the company, it resembled that of another existing company carrying on similar business. This rule applies irrespective of the fact that there was no fraudulent intention on the part of the promoters of the proposed company. All that is required is that the Court should be satisfied that the name in which the company seeks to register itself is "likely to mislead" or is "calculated to deceive" irrespective of the intention of the promoters. (*National Bank of India Ltd. v. National Bank of Indore*, 24 Bom. L.R. 1181). In the course of the judgement in Tussaud's case referred to above, *Stirling, J.*, observed that even though Tussaud was the name of the promoter of the company who was to be its servant, that gave the company no right to adopt that name, as it happened to be similar to that of the old established company of great reputation in the same line of business, because

the use of such a name was bound to mislead customers, who in this case were made up of travellers from foreign countries, in mixing up the two wax works exhibitions and believing the new company to be the same as the old one, deprive the old company of its profits. In the opinion of his Lordship, the fact whether the company had in its service a person with the name of Tussaud, or not, made no difference, because Louis Tussaud, of the new company, having no right of goodwill in the old company could not confer that right to the new company. All that can possibly be conferred was the right of a statement to the effect that the business of the company was under his (Louis Tussaud's) management. But he could not say "I will become your servant or manager, modeller or souvenir, and shall carry on the business—which is not to be mine, but yours—under my name." (See also *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, 1899, A.C. 83).

This besides applying to English companies, also applies to foreign companies or traders, whose goods are imported into the British Empire, as in the case of *La Societe Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Company, Limited*, 1901, 2 Ch. 513—where the plaintiffs, who were a French company carrying on business in Paris as motor car manufacturers in succession to the former firm of Panhard et Levassor and were using the word "Panhard" in connection with motors of their manufacture, objected to the use of the word "Panhard" in the name of the defendant company on the ground that the principal object of the defendant was to wrongfully and fraudulently injure the plaintiffs' business by passing off their goods as those of plaintiffs' manufacture, and succeeded even though (they the plaintiffs) had no agencies in England but had a market for their goods there. A company is not entitled to carry on business under a name which is likely to deceive the public as to its identity. (*Sturtevant Engineering Co., Ltd. v. Sturtevant Mills Co. of U. S. A., Ltd.*, 1936, 3 All. E.R. 137). A person who has never done business in his own name cannot register a company in

his name if it is likely to cause confusion or mislead the public in thinking that the company he floats has some connection with an existing company. (*Harrods Ltd. v. R. Harrod Ltd.*, 1924, 4 T.L.R. 195; *Fine Cotton Spinners' Association v. Harwood Cash & Co.*, 1907, 2 Ch. 189.)

It should, however, be added that mere similarity of name will not in itself be considered a sufficient ground for objection, provided the use of such a name does not injure the business of the existing firm or company. This would generally be the case where the business proposed to be carried on by the new company, whose name has some similarity with that of the old company, is quite distinct from that of the objecting company, and where there is no danger of deception or misunderstanding. (*Dunlop Pneumatic Tyre Company Ltd. v. Dunlop Motor Co.*, 1907, App. Cas. 430). It may be further added that it is not necessary to prove any fraudulent intention on the part of those using a similar name. All that is wanted is that the name is likely to mislead considering all circumstances. (*Singer Machine v. Wilson*, 1877, 3 A.C. 376; *Merchant Bank Company of London v. Merchants Joint Stock Bank of London*, 1878, 9 Ch. D. 506; *Standard Bank of South Africa v. Standard Bank*, 1909, 25 T.L.R. 420).

There have been cases however where the Courts have refused injunctions on the ground that the name adopted being merely descriptive of the character of the business of the companies concerned, they could not interfere. (*London and Provincial Law Society v. London and Provincial Joint Stock Life Assurance Co.*, 1847, 17 L.J. Ch. D. 37; *Colonial Life Assurance Co. v. Home and Colonial Assurance Company*, 1864, 33 Beav. 548; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Company*, 1907, 2 Ch. 312).

Generally speaking, the **two important factors** to be taken in view in this connection are the nature of the name and the type of the business. If the nature of the business is the same and the name is similar to that of an existing company, objection would natu-

rally arise as that factor is one which is likely to mislead the public. (*Aerators Co. v. Tollit*, 1902, 2 Ch. 319, *Lloyds Bank v. Lloyds Investment Co.*, 1912, 28 T.L.R. 379, *Waring & Gillow v. Gillow & Gillow*, 1916, 32 T.L.R. 389). It may be that an ordinary English word may acquire a secondary meaning as to denote only the goods sold or manufactured by the plaintiff, but of course that fact will have to be proved and will be a difficult fact to prove. (*Reddaway v. Banham*, 1896, A.C. 193, *Aerators Co. v. Tollit*, 1902, 2 Ch. 319). Similar would be the position where the name selected is descriptive of the place where the business is carried on. (*Colonial Life Assurance v. Home and Colonial Assurance Co.*, 1864, 33 L.J. Ch. 741). In one case where an insurance company was carrying on business under a name in which the word "guardian" was used as the first word it was restrained from carrying on business in the same street with another company using the same word in its name. (*Guardian Fire and Life Assurance v. Guardian & General Insurance*, 1881, 50 L.J. Ch. 253). And another company with the word "accident" in its name was similarly restrained from using that name though a registered company. (*Accident Insurance Company Limited v. Accident Disease and General Insurance*, 1884, 54 L.J. Ch. 104). Where the name misleads in the belief that an existing company has been absorbed by the newly formed company that will be a ground for injunction. (*Manchester Brewery Co. v. North Cheshire and Manchester Brewery Co.*, 1899, A.C. 83). A descriptive word or title cannot be appropriated in its name by a company in order to obtain a monopoly of same (*Aerators Co. v. Tollit*, 1902, 2 Ch. 319). Any person, whether a company or individual, can, by showing that he suffered special damage, restrain other persons from registering a company under a name calculated to deceive. (*Tussaud v. Tussaud*, 1890, 44 Ch. D. 678, *Hendriks v. Montague*, 1881, 17 Ch. D. 639). However, if a company through **inadvertence**, or otherwise, is registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated

to deceive, the first named company may with the sanction of the registrar change its name. (Sec. 11 (2)). In such a case the registrar usually requires a resolution of the company authenticated by the secretary or some officer of the company.

### **Statutory Prohibition**

In this connection Sec. 11 (3) lays down that "except with the previous consent in writing of the Central Government, no company shall be registered by a name which :—

(a) contains any of the following words, namely, 'Crown', 'Emperor', 'Empire', 'Empress', 'Federal', 'Imperial', 'King', 'Queen', 'Royal', 'State', 'Reserve Bank', 'Bank of Bengal', 'Bank of Madras', 'Bank of Bombay' or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof;

or

(b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter;

*Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.*

It may be noted here that the English Act of 1929 prohibits the words 'Royal', 'Imperial', 'Municipal', 'Chartered' and other similar words from being used without authority in connection with the name of a company and also further prohibits the words 'Building Society', 'Chamber of Commerce' or 'Co-operative Society' being so used.

Another requisite is that in case the company is a limited company, the name shall contain the word "**Limited**" as the last word. One more requirement with regard to the name is that it shall be painted or affixed in a prominent place and in letters easily legible outside the office or place or places of business of the company, and further that, in every **circular, letter, or**

**document, advertisement and other publications** issued officially by the company, the said name shall appear. The name should also be engraved in legible characters on the company's seal. This writing of the name has to be done in English characters, and where the company's registered office in India is situate in a place **beyond the local limits of the ordinary original civil jurisdiction of the High Court**, it should also be painted or printed, in the characters of **one of the vernacular languages used in the place**. Failure to observe these requirements makes every officer who knowingly authorises or permits it liable to a fine not exceeding Rs. 50 for every day during which the default continues (Secs. 73, 74). The same rule applies to all bills of exchange, *hundis*, promissory notes, endorsements, cheques, or orders for money or goods, issued by the company and signed by itself or one of its officers.

#### THE SITUATION

With regard to the situation clause all that is required is a statement as to the province in which the registered office of the company is to be situate. **The exact address in detail should not be inserted in the memorandum.** It has to be furnished separately to the registrar. It may be noted that if a company has no registered office, *e.g.*, where it is burnt down, a writ of summons may be served upon the secretary and directors.

With regard to the registered office, **it is compulsory** under Sec. 72 for a company *to have a registered office as from the date on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation whichever is the earlier at which all communications and notices may be addressed* and a notice in writing of the situation of the registered office of any change therein shall be *given within 28 days after the date of the incorporation of the company or of the change as the case may be* to the registrar who shall record it. The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the

obligation imposed by the section. *In India in case a company carries on business without complying with these requirements, it shall be liable to a fine not exceeding Rs. 50 for each day during which it so carries on its business.* The filing fee for such notices is Rs. 3 for each document. The transfer or change in the place of the registered office of the company from one province to another can only be made according to Sec. 12 by a special resolution and after obtaining the confirmation from the Court on the same footing as in case of the alteration of the objects clause of the memorandum of association which we shall deal with later on in detail. However, **if the company does not happen to have a registered office, service of notices and petitions may be effected even at an unregistered office.** (*British and Foreign Gas Generating Apparatus Co.*, 1865, 13 W.R. 649; 12 L.T. 368; *Fortune Copper Mining Co.*, 1871, 10 Eq. 390). Normally, of course, where there is a registered office, it is the proper place where all notices, writs of summons and other processes **must be served**; Order 29, rule 2 of the Code of Civil Procedure 1908, regulates service of processes on all joint stock companies, under the Indian Companies Act, 1913, and all previous Acts.

It will be seen that the main purpose sought by the Act to be achieved in connection with the registered office is **to definitely provide a place at which notices and other documents may be served and where the register of members must be kept and should be open for inspection during business hours as provided for by the Act.**

### THE OBJECTS CLAUSE

The objects clause **is the most important of all the clauses in the memorandum** and has therefore to be drafted with considerable care. The **scope of a company's operations is indicated principally by this clause**, and as we shall see later, the alterations, if found afterwards necessary, through the irregular and careless drafting in this regard, are most difficult as well as expensive. Besides, the **Act has provided for a very limited**

**scope for these alterations.** It is therefore best to state all the branches of the business which the company is formed to carry out with all clearness and in detail. Words such as "to do such other business as may be deemed incidental or conducive to the attainment of the above objects, or any of them," would only mean objects similar to those expressly provided for in the clause. Attempts have been made to make the objects clause all-expressive by the use of some such words as "to do any other business which the company may, from time to time, determine." Such a form is objectionable, and generally speaking, the registrar will refuse to register the company with such **wide and undefined** objects. The next point to remember is that what the objects clause is expected to embrace are the objects and powers by which these objects are to be carried out. The objects for which the company is formed **should be legal**, *i.e.*, they should not include anything which is opposed to the general law, or to the requirements of the Companies Act itself.

The principle that the objects stated in this clause in the memorandum cannot be departed from materially, was laid down so far back as 1860, in the famous case of *Simpson v. Westminster Palace Hotel Co.*, 8 H.L.C. 712. Here, though it was held that a company which was according to the objects clause of its memorandum, principally formed for the purpose of carrying on the business of a hotel, and for that purpose was empowered to purchase lands, give leases, erect buildings, etc., was within its rights to let out a portion of its premises temporarily. The dictum laid down there was that the **funds of a joint stock company established for the purpose of one undertaking, cannot be applied to another, in spite of the fact that the same was sanctioned by all the directors and by a large majority of the shareholders.** The Lord Chancellor—Lord Campbell—said in this connection that "the funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, such an act would be *ultra vires*, and although sanctioned by all the directors and by a large majority of



the shareholders, a single shareholder has a right to go to a **Court of Equity** which will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted; companies established for granting of fire and life insurance policies cannot engage in marine insurance; a company established to work a railway and to carry on the trade of a carrier on a line from one town of England to another cannot add to it the trade of a steam packet company, and no company can ever abandon the business for which it was established and undertake another." This principle was confirmed later on in 1875 in the case of *The Ashbury Railway Carriage and Iron Company v. Riche*, 1875, L.R. 7 H.L. 653. In this case a company was registered under the English Companies Act of 1862, with the object "to make and sell, or lend on hire, railway carriages and wagons and all kinds of railway plants, fittings, machinery and rolling stock; to carry on business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, lands or buildings; to purchase and sell as merchants, timber, coal, metals or other materials and to buy and sell any such materials on commission or as agents." Here the directors entered into an agreement by which they purchased a concession for making a railway in a foreign country, and thereafter, agreed to sell this concession to some other company. This agreement was declared to be *ultra vires*, as not being of a nature included in the memorandum of association.

In this connection it is interesting to note the following cases :—

(1) A railway company which wanted to improve the navigation of a river which was necessary for its prosperity, was prevented from doing so on the ground that the application of funds to promote a bill in Parliament for an object so different from that for which the corporation was formed was *ultra vires*. (*Munt v. Shrewsbury Railway Company*, 1850, 13 Beav. 1).

(2) On the same ground as in the above case, a railway company which proposed to subscribe to the Imperial Institute was

prevented from doing so. *Tompkinson v. S. G. Railway Company*, 56 L.T. 830); and another railway company proposing to work coal mines was also prevented—(*Attorney General v. G. N. Railway Company*, 1860, 1 Dr. and Sm. 283). Also where a company's funds were attempted to be applied for the purpose of paying the costs of its directors in a libel suit, it was declared *ultra vires* because the company was not at all concerned with the libel. (*Studdert v. Grosvenor*, 33 C.D. 528).

Besides these, there are **powers which a joint stock company cannot exercise under any circumstance**, and therefore, they must not be included in the objects clause, *e.g.*, a shipping company cannot be formed to run its ships or steamers under a foreign flag. Nor can a company be formed with the object of practising a profession which under a particular Act cannot be made the business of a joint stock company or corporation, *e.g.*, a corporation which attempted to get itself registered as a dentist was prevented from doing so, because it was held that a company cannot be a dentist registered under the "Dentists' Act". (*Rowell v. Registrar of Joint Stock Companies for Ireland*, 1904, 2 Ir. R. 634). The memorandum also cannot embrace anything in contravention of the Act. (*Ooragum Co. v. Roper*, 1892, A.C. 125). Objects in the memorandum imposing unreasonable restraint on the members are also illegal, being in restraint of trade. (*McElistrim v. Bellmacelli Sott. Co-operative A. & D. Society*, 1919, A.C. 548).

On the other hand the following have been held to be *intra vires* :

Where a company formed to work a patent, bought the same (*Leifchild's Case*, 1865, 1 Eq. 231); where a company enjoying powers of lending money, lent it to a servant of the company (*Rainforth v. James Keith*, 1905, 2 Ch. 147); where a trading company created a mortgage in order to secure a debt (*Patent File Company*, 6 Ch. 83).

Of course certain powers are generally implied if not expressly taken by the company (*e.g.*, a trading company has always implied

powers to borrow, etc.). It is, however, wise to provide for all possible powers that the company is likely to exercise in the legitimate course of its business and which are fairly incidental to the business of the company- The only thing to be guarded against is to see that none of the powers taken, happen to be illegal.

#### **RULES OF CONSTRUCTION APPLYING TO MEMORANDUM.**

It may be added here that there is **no particular rule** of construction or interpretation of documents which would apply to the memorandum and articles of a company and it has been held that they should be construed in a manner so that a **just** and no other **construction** would arise; they are not expected to be construed liberally or strictly or rigorously. (*London Financial Association v. Kelk*, 1884, 26 Ch. D. 107). The only thing that could be done is that where the memorandum happens to be ambiguous or silent, the **articles** of association may be referred for the purpose of explaining the memorandum in respect of a matter which need not appear in the latter, but of course, with regard to anything which the Act requires to be stated in the memorandum, the memorandum must be the only document that could be looked at. (*Re. Southern Brazil Rio Ry. Co.* 1905, 2 Ch. 78; *Guinness v. Land Corporation of Ireland*, 1882, 22 Ch. D. 349). Generally speaking, where wide and general powers are given, in addition to specific powers, the **wide powers will only be read as ancillary to the specific powers** and not treated as independent objects. (*German Dute Coffee Co.*, 1882, 22 Ch. D. 169). Of course in case of doubt the **memorandum must be read as a whole** with a view to see whether later clauses are really intended to include powers beyond those contained in the earlier clauses. (*Butler v. Northern Territories Mines of Australia*, 1907, 96 L.T. 41). In some cases the memorandum clearly lays down that each paragraph is to be read separately and without limitation by reference to other clauses. Here effect must be given to this provision. (*Cotman v. Brougham*, 1918, App. Case 514). Express powers given cannot be ignored for the simple reason that they differ widely from the principal objects

of the company. There is also a practice of adding provisions which are really not required by the Act to be stated in the memorandum such as an agreement with the managing agent or a similar paragraph. In such cases it was previously held that such paragraphs in the memorandum would be unalterable. (*Ashbury v. Watson*, 1885, 30 Ch. D. 376). This was, of course, subject to the rule that where the memorandum itself gives the power of altering such provisions that can be done. (*Welsbach Incandescent Gas Co.*, 1904, 1 Ch. 87). This law is now altered in **India** by the proviso added to Sec. 10 by the Amending Act of 1936 to the effect that *any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company shall not be deemed to be conditions* of the memorandum as laid down in Sec. 10, which cannot be altered except as provided for by the Act. Of course it cannot be argued that everything which is not included or expressed in so many words in the memorandum must be *ultra vires*. Everything which could be fairly regarded as incidental or consequential to the objects which are specified is not *ultra vires* unless expressly prohibited. (*Attorney General v. The Great Eastern Ry. Co.*, 1880, 5 App. Case 473). Thus ancillary clauses have been treated on several occasions as extending the powers of the company. (*Re. Baglan Hall Colliery Co.*, 1870, 5 Ch. 346).

### ULTRA VIRES ACTS.

As we have already seen, the powers of a company are limited by the Memorandum. Acts which are outside the powers of a company as defined in the Memorandum, are *ultra vires* and void, and nothing validates them. (*Ashbury Railway Carriage Co., v. Riche* (1875), L.R. 7 H.L., P. 672). Acts, however, which are fairly incidental to or consequential upon the powers will hold good (*Foster v. L. C. & D. Railway*, (1875) 1 Q.B. 711.)

A person who enters into a contract which is *ultra vires* the company obtains no rights because the Memorandum and Articles

are registered and open to public inspection and every person dealing with the company ought to ascertain and is deemed to have notice of the limitations upon the company's powers and enters into dealings with the company at his own peril (*Royal British Bank v. Turquand*, (1856) 6 E. & B. 327).

An act which is **ultra vires the company** cannot be ratified but an act which is merely **ultra vires the directors** (i.e., *intra vires* the company) may be ratified by the company by passing an ordinary resolution.

#### DECLARATION OF LIABILITY OF MEMBERS.

The next clause of the memorandum of association states whether the liability of the members of the company is to be limited or unlimited. In case it is to be limited, **it should be made clear, whether** it is to be limited **by guarantee, or** limited **by** the face value of the **shares** issued in case of companies whose capital is divided into so many shares. If the liabilities are to be limited, the statement should run as follows ; "The liability of the *members* is limited." It is not at all correct to say, "The liability of the *company* is limited." When a company is formed with a capital divided into shares, and the liability of the members is limited to the face value of the shares they have taken up, or agreed to take up, it means that in case of the liquidation of the company, the utmost that a member could be called upon to pay is the amount which remains unpaid on the nominal capital of the shares he holds. This **liability** not only **attaches to** the present holders, *i.e.*, the shareholders who were shareholders at the time the company went into liquidation, but also attaches to every member who had transferred his share or shares within one year from the date of liquidation of the company, in case the person to whom he had transferred his shares within this period of one year, fails to pay the "calls" made by the liquidator on his unpaid amount of capital, and the total amount contributed by the members is insufficient to pay the debts of the company. Of course, these must be such debts as were **incurred during the term of his membership.**

Besides this, it is provided by Sec. 70, that in a limited company, though the liability of members is limited, the **liability of directors**, or of any of them, **may**, if so provided by the memorandum, **be unlimited**. In such case, a person who proposes any director with unlimited liability has to include in his proposition, a statement to the effect that the liability of the person holding that office will be unlimited, and the promoters or officers of the company shall, before such a person accepts the office, or acts, give notice to such proposed director in writing, informing him of the nature of his liability. Failure to take this precaution will make the officers concerned liable to a fine, not exceeding Rs. 1,000 and also to damages which the person so selected as director may sustain as a result of this omission. When a director with unlimited liability retires from office, his liability ceases with respect to the debts incurred during the term of his office at the expiration of one year from the time of his retirement. He is, of course, not liable for any debts incurred after his retirement.

It may be added here that in the case of limited companies, the **limited liability** of members is **lost** where the company carries on business beyond *six months* while the membership number **falls below seven** in the case of public companies, and below two in the case of private companies. In such a case the remedy of any surviving member is to immediately apply for an order for compulsory liquidation in self-protection as otherwise every member aware of the fact becomes fully and severally liable for debts incurred after such six months.

#### CLAUSE RE. CAPITAL OF THE COMPANY.

This clause states the amount of capital with which the company is registered i. e. its **authorised** capital and its division into shares, distinguishing each class of shares—if any—such as **preference, ordinary and deferred**, etc. This capital is the utmost amount which the company can issue. There is no legal limit to the amount of authorised capital or of each share. The rights

and privileges of each class of shareholders need not necessarily be stated in the memorandum as they can be conveniently referred to in the articles. If the rights and powers of each class of shareholders are stated in the memorandum, a power to alter or vary these rights ought also to be taken in the said document, in order to save the trouble and expense of altering it at a later stage.

The words in which the statement of the company's capital and its division generally appears are as follows:—"The capital of the company is Rs. 1,00,000 divided into 100 shares of Rs. 1,000 each." Here it is not necessary that all the 100 shares should be issued or subscribed for, but the utmost limit here laid down is Rs. 1,00,050, beyond which the company cannot issue without altering the memorandum. This capital is quite distinct and separate from the amount raised through the issue of debentures, which, though called in common parlance "**loan capital**" does not form part of the capital at all, but is money raised, or borrowed, which only trading companies have the implied power to do, and which every other class of companies can do, under powers specially taken either in its memorandum, or in the articles.

In cases where the shares are divided into different denominations carrying different rights and privileges, as to the payment of dividends or as to the return of capital on the winding up of the company, that may be stated either in this clause of the memorandum or in the articles of association of the company. It is not compulsory that the powers to issue different denominations of shares should be expressly taken in the memorandum of association, as the company can at any time take these powers. (*Andrews v. Gas Meter Company*, 1897, 1 Ch. D. 361; *Ashbury v. Watson*, 1885, 30 Ch. D. 376). Generally speaking, it is thought that it is wise to show on the face of the memorandum that it is the intention of the company that the powers of this type may be exercised. It should, however, be remembered that **once the powers are stated in the memorandum, they cannot subsequently be varied without the sanction of the Court**, unless the memorandum itself confers

powers to alter such rights. (*Underwood v. London Music Hall*, 1911, 2 Ch. D. 309). The **usual practice** is to state in the memorandum that these shares are to enjoy such powers as the articles of association may from time to time confer, in which case a free hand is left for the alteration of such powers by the usual alteration of the articles of association themselves. (*Collins v. Birmingham Breweries*, 1890, 15 T. L. R. 180). The best course to follow is to state that the company has the power to issue ordinary and preference shares and leave the rest to the articles.

### Declaration of Association.

The last paragraph with which the memorandum ends is known as the "Declaration of Association" or the "Association Clause", which runs as follows, according to Schedule 3, Form A of the Companies Act :—

"We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

The **subscribers** to this memorandum, sign their names under this paragraph stating opposite such signature the number of shares taken up by each. The usual practice is to state one share though they might have contracted to buy more. At least **seven** subscribers should sign the memorandum, and the name, address and occupation of each such subscriber should be mentioned fully. A subscriber may be a male or female, though a minor should not subscribe.

### MANAGING AGENCY CLAUSE.

According to **Indian practice**, a firm or company often constitutes itself, or is appointed as, the managing agents of a joint stock company by special agreements between it and the company, by virtue of which the said firm acts as managers, secretaries and agents for a remuneration. In many cases, these firms of managing agents insert a statement as to their appointment in the objects



clause of the memorandum of association, and in other cases have inserted additional clauses to the usual clauses of the memorandum of association, with the same object. We have, however, dealt with managing agents at some length a little later, in view of the fact that now, under the Indian Companies (Amendment) Act of 1936, managing agents have been specifically defined in the Act and a series of sections newly added in the Act deal with their powers, duties, working and organisation, including managing agency agreements.

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## CHAPTER IV.

ALTERATION IN THE MEMORANDUM  
OF ASSOCIATION.

The alteration of the memorandum of association of a company can **only** be made in **certain defined cases** and in the manner provided for by the Indian Companies Act of 1913. The exact language of the section which lays down this rule is "A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act, *provided that any provision in the memorandum relating to the appointment of a manager or the managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company shall not be deemed to be such condition*". The words in italics have been added by the Amendment Act of 1936. This proviso now makes it possible to alter extraneous clauses which are added in the memorandum with respect to contracts with managing agents, etc., which under the old law could not be done. Thus all old decisions on this question are now obsolete, (Sec. 10).

The variation of the memorandum may be made with one or more of the following **aims** in view --

- (i) For the purpose of changing the **name** of the company, (Sec. 11).
- (ii) For the purpose of varying either the **place** of business or the registered office of the company from one province to another
- (iii) For the purpose of altering one or more of the **objects** of the company, (Sec. 12).
- (iv) For the purpose of varying the amount of the company's **capital** or for reorganisation, (Secs. 50 and 54)

**ALTERATION OF NAME.**

The name of a company can be altered by a **special resolution** and subject to the **approval of the Central Government** in writing, (Sec. 11 (4)). In England the **board of trade** has to sanction the change of name and the principal followed there, which is the guiding principal here also, is that a change in name which appears to alter the main object, or is inconsistent with it, is not sanctioned. Such a change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company. Where such a change of name is duly carried out, the registrar shall enter such new name on the register, in place of the old name and shall issue an **altered certificate of incorporation** to meet the circumstances of the case. The issue of such a certificate shall complete the change of name, (Sec. 11 (5)).

It may be added that **no** change of name will make any **difference as far as** any **rights or obligations** of the company are concerned, nor shall it render defective any legal proceedings by or against the company : and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name, (Sec. 11 (6)). It is further provided by Sec. 11 (2) that if through **inadvertence** or otherwise a company is registered by a name **too closely resembling** that of an already existing company, the first named company may, with the **sanction of the registrar**, change its name. There are cases, however, where the Courts have allowed an alteration in the objects of the company only where the company has correspondingly altered its name to suit the position it is likely to occupy through the extension of such an object (*Foreign & Colonial Government Trust Company*, 1891, 2 Ch. D. 395). The Indian Mechanical Gold Company was permitted to extend its object to include places outside India on altering its name by adding the words "And General" to it. (*Indian Mechanical Gold Company*, 1891, 3 Ch. D. 538). The Egyptian Delta Land Company was similarly permitted to extend its objects by adding

the words "And Soudan" to its name after "Delta". (*Egyptian Delta Land Company*, 1907, W.N. 16). The tendency of the modern Courts is of a more liberal character and now-a-days it is seldom that a change of name is insisted on side by side with the extension of the objects. (*Trust and Agency of Australasia*, 1908, W.N. 229). Here the company wanted to extend its operations from Australasia to Argentina, which was permitted without change of name.

When the company alters its name it should immediately get its altered name **entered in the register** by the registrar in place of its former name and get a **new certificate of incorporation or the original certificate altered to meet the case**. This is essential because unless this course is followed the change of name is not complete and till then the company remains in existence in law under its original name (*Shackleford Ford & Co v. Dangerfield*, 1868, L. R. 3 C. P. 407 at p. 411). If, however, it is discovered, after the certificate is issued altering the name, that special resolution required by the Act was not properly passed an application may be made to the registrar to vacate the registration (*Re. Australasian Mining Co.*, 1893 W. N. 74). Of course this change of name does not, as we already noticed, in any way alter the position of the company as far as its rights and obligations are concerned and any legal proceedings that may have been taken prior to such alteration can be continued in its former name (Sec. 11 (6)).

Where a company had sold its assets and good will in liquidation to certain purchasers who formed a new company under a new name and took over the assets, it was held that no injunction can be granted against the use of the original company's name by a person who did not represent himself as the successor of such company and whose user had been acquiesced in by the liquidator of the old company and the purchaser of its good will. (*Montreal Lithographing Co. v. Sabiston*, 1899, A. C. 610).

**THE SITUATION AND THE OBJECTS.**

An alteration of the memorandum with a view to change the situation of the registered office of the company, or with a view to alter the objects clause, can only be done by passing a **special resolution**, on its being shown to the **satisfaction of the Court** that such an alteration is rendered necessary **for** one or more of the **following reasons** :—

- (a) to carry on its business more economically or more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or
- (c) to enlarge or change the local area of its operations ; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ; or
- (e) to restrict or abandon any of the objects specified in the memorandum.

It may be noted here that in **England** the memorandum must state where the office is to be situated (which includes Wales or Scotland or Ireland) and hence this situation fixes the **domicile** and nationality of the company concerned which cannot be altered without the **consent of Parliament**. The alteration in the situation of the registered office itself from one address to another in its original domicile may, of course, be made by simply giving notice to the registrar of joint stock companies.

The Court confirming the alteration requires to be satisfied that every debentureholder of the company has been duly notified, and that sufficient notices are sent to any person, or class of persons, whose interest will, in the opinion of the Court, be affected by such an alteration. Besides this, every **creditor** who, in the opinion of the Court, is entitled to object and who signifies his **objection** in the manner directed by the Court, has to be either **made to consent** to the alteration, or to have his claim satisfied or secured to the satisfaction of the Court (Sec. 12). The Court may **make an order**

confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit and may make such order as to costs as it thinks fit (Sec. 13).

### PROCEDURE AS TO ALTERATION OF OBJECTS

The procedure to be followed here is to draft the necessary resolution as to alteration of objects and to have it approved by the Board of Directors. At the same meeting of the board the date of the meeting of the company for passing the resolution as a special resolution should be fixed and authority taken for giving notice to call an extraordinary meeting of members. After the special resolution is passed a copy of it must be filed with the registrar within **15 days** from the date of the resolution. The next step is the petition to the Court for confirmation of the alteration. After presentation of the petition directions should be obtained as to the fixing of a date for hearing, the advertisement of the petition, and the service of notices to debenture holders, creditors and other persons whose interests are likely to be affected in the opinion of the Court. Creditors entitled to object and objecting should be paid out or satisfactorily secured or then consent obtained as to the alteration. The Court will also have regard to the right of any minority of shareholders, or class of shareholders, who dissent to the alteration and may even adjourn or grant time, with a view to enable arrangements being made for their interests being bought over. The Court at its discretion may make the order confirming the alteration either wholly or in part or on such terms and conditions as it thinks fit. (*Re. Spiers & Pond*, 1865, W. N. 135, *Ulster Marine Co.*, 1891, 27 L. R. II. 487) The Court may, in case of any person or class for special reasons, dispense with the notice as required above (Sec. 12).

A certified copy of the order confirming the alteration together with a printed copy of the memorandum as altered must be filed by the company with the registrar within **three months** of the date of the order, and the registrar shall certify the registration

which **certificate** shall be **conclusive evidence** that all requirements of the Act with respect to the alteration and the confirmation have been complied with. When the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed with the registrar in each such province and each registrar shall issue a certificate of such registration (Sec. 15). It should be noted that the alteration shall have no operation until registration as above and after the expiry of three months as provided above shall be null and void subject to revival by the Court on sufficient cause shown on an application made within a further period of one month (Sec. 16).

#### **LAW AS TO ALTERATION OF OBJECTS.**

The alteration of the objects will not mean the introduction of an entirely new object. (*Re. Cyclist's Touring Club*, 1907, 1 Ch. 269). This view of law has been considerably modified of late and Courts of Law seem to have given a more liberal construction to the section (corresponding Sec. 12 of the Indian Act) of the English Act. In *re. Parent Tyre Co. Ltd.*, 1923, 2 Ch. D. 222, the principle laid down is that in case a company wishes to alter its memorandum by adding a business, that business may be wholly different from and bearing no relation to the then existing business of the company and yet be capable of being "conveniently and advantageously" combined with it, provided such new business is not destructive of or inconsistent with the existing business. It was further laid down here that the question whether the new business can be conveniently or advantageously combined with the existing business is a question for the company's managers and shareholders to decide. In this case the *Parent Tyre Co.*, according to the objects clause as originally provided for, was authorised to take over and carry on the business of a manufacturer of pneumatic tyres and to do business in cycles, carriages, etc. There was no provision to enable the company to carry on the business of bankers or financiers and it was sought to

get these powers. They were permitted to do so on the grounds stated above.

When an objects clause is altered, the **Court may order a corresponding alteration in the name** of the company. The Court has also the discretion to limit the scope of the proposed alteration by striking out a part if so thought necessary, though, generally speaking, it is not the concern of the Court to decide upon the desirability or otherwise of the alteration. All that it has to see is whether the proposed alteration is **fair and equitable** between various members and between various classes of members. (*Jewish Colonial Trust*, 1908, 2 Ch. 287). The Court must, however, **protect** the interests of the **dissentient minority**. It may, if it think fit, adjourn the proceedings, in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interest of the dissentient members, and may give such directions and make such orders, as it may think expedient for facilitating or carrying into effect any such arrangement (Sec. 14).

It has also been held that additional provisions inserted in the memorandum without qualification, become conditions of the company's constitution and cannot be altered. (*Ashbury v. Watson*, 30 Ch. D. 376). When the alteration is confirmed, a certified copy of the order confirming this alteration, together with a printed copy of the memorandum as altered, must within **three months** from the date of the order be filed by the company with the registrar. The registrar after registering it certifies the registration under his hand.

If the alteration involves a change in the situation of the registered office from one province to another, a certified copy of the order confirming such change has to be filed with the registrar in each of such provinces, and each such registrar has to certify the registration of the company (Sec. 15).

### **Sanction Subject to Modification.**

Frequently the Courts have sanctioned the alteration of objects subject to modification or alteration by the Court itself and in con-



nection with such modification, the later decisions do **not** require any **further special resolution** approving such modifications limiting objects, as was the case formerly. Thus in *re. Spiers and Pond, Limited*, 1895, W.N. 135 (2) the Court held the words which sought to effect the alteration to be too wide and decided that as they had the power to confirm the alteration "in part", they could confirm the alteration with the addition at the end of the sentence of the limiting words "incidental thereto". Another case was *in re Fleetwood Estate Company*, 1897, W.N. 20, where the Court sanctioned resolutions extending the objects defined in the memorandum of association adding words to the language of the resolution, so as to limit the extended objects.

### ALTERATION OF CAPITAL NOT REQUIRING SANCTION OF COURT.

In connection with the alteration of the capital of the company the following section of our Indian Companies Act lays down the manner in which it can be effected

S. 31 (1). A company limited by shares if so authorised by its articles may alter the conditions of its memorandum as follows (that is to say), it may

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares
- (c) convert all or any of its paid up shares into stock and reconvert that stock into paid up shares of any denomination
- (d) sub divide its shares or any of them, into shares of smaller amount than is fixed by the memorandum, so however that in the sub division the proportion between the amount paid and the amount, if any unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived,
- (e) cancel shares which at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares not cancelled

(2) The powers conferred by this section must be exercised by the company in general meeting

(3). A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(4) *The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.*

It will be noticed from the above that sub-section (4) of Sec. 50 adds now under the new Indian Law a further requirement that the company shall file with the Registrar a notice of exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.

A careful study of the above Section 50 will show that the said section enables a company limited by shares, if so **authorised by its articles** to alter the conditions of its memorandum in order to bring about any one or more of the following results ;—

(i) to **increase** the share capital by new shares of such amount as may be necessary ;

(ii) to **consolidate** and divide all or any of its share capital into shares of larger amount ;

(iii) to **convert** any paid-up share into stock or reconvert stock into paid-up shares ;

(iv) to **sub-divide** any of its shares into smaller shares provided the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as was the case in the original shares ; and

(v) to **cancel** shares not taken or agreed to be taken up for any such cancellation.

Any of the above alterations of capital may be effected by an **ordinary resolution** by the shareholders in general meeting unless the articles provide for a different type of resolution. As soon as the alteration is made the **memorandum must be** correspondingly **altered** and every copy of the memorandum subsequently issued must exhibit such alteration.

**Increase of Capital.**

Here increase means increase **over the authorised capital** of the company at the time when the resolution to increase such capital is to be passed. The Act does not make any specific provision as to how the increase is to be brought about, but infers that it can be done subject to the provisions in the articles, which means that a resolution, ordinary, extraordinary or special, as may be provided for by the company's articles, shall be passed. **If the articles do not provide** for any such contingency, the only course left open will be to alter the articles in the usual manner by passing a **special resolution**.

Unless this increase of capital is done by a proper resolution as laid down in the articles, the increase shall not be valid (*Bhimbhai v. Ishwardas*, 1894, 18 Bom. 152). The article may empower a company to increase its capital without an extraordinary or special resolution in which case an ordinary resolution is sufficient. A company may even confer on the directors the power to make the increase (*Mosely v. Koffyfontein Mines*, 1910, 2 Ch. 382). In a recent case where by the memorandum of association the company was empowered to issue a part of its capital with preferential rights and the articles did not give any express power to issue preference shares, but the articles stated that shares were to be under the control of the directors and so was the management of the business, it was held that the express power in the memorandum could be exercised (*Campbell v. Rofe*, 1933, A.C. 91). When the articles are said to be amended with a view to get the power to increase the capital, one special resolution amending the articles is sufficient if it authorises the issue of new shares (*Re. Bank of Hindustan, China and Japan, Campbells' case*, 1873, 9 Ch. 1.) It is further enacted by Sec. 63 that within **fifteen days** after passing of the resolution for increase of the share capital or after the resolution authorising such increase, a notice shall be given to the registrar of joint stock companies. *This notice shall include particulars of the classes of shares affected and the conditions,*

(if any) *subject to which the new shares are to be issued.*

S. 53 (2) ). (The italics have been added by the Amending Act. of 1936). Default in complying with the requirements of this section entails **fine** not exceeding Rs. 50 each day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits such default shall be liable for a like penalty. It may be added, however, that there is no objection to issuing shares at a premium, but in such case the premium should be carried to the credit of a separate reserve fund or any other account such as the "premium on shares account", and not mixed up with the capital.

### **Consolidation or Conversion of Share Capital.**

Consolidation and conversion can only be effected **if the articles so authorise** and in the manner provided for by the articles. (S. 50 (1) (b)). The remarks in connection with the increase of share capital apply as far as the clause in the articles not being there is concerned, but assuming that the clause is there, consolidation or conversion can be effected by a resolution as provided for by the articles. **Notice** of both conversion and consolidation must be given within **fifteen days** of effecting the same to the registrar of joint stock companies as provided for in the case of increase of capital with like penalties, and every copy of the memorandum should be in conformity with the consolidation or conversion after the date of the alteration.

### **Conversion of Paid-up Shares into Stock & Vice Versa.**

With regard to the conversion into stock, the shares which are **fully paid** may, **if authorised by the articles**, be converted by the company in **general meeting** into stock or in case where the company has converted shares into stock, it may reconvert the said stock into paid-up shares of any denomination (S. 50).

### **Sub-division of Shares.**

A similar rule is provided by sub-clause (d) of Sec. 50 under which a company can sub-divide its shares into shares of smaller

amount, the only condition being that the **proportion** between the amount paid and the amount, if any, unpaid on each **reduced share** shall be the **same** as it was in the case of the share from which the **reduced share** is derived. Here it may be stated that in a reorganisation of share capital under Sec. 55, the Court may, in sanctioning a sub-division, allow such adjustment to be made where the amount unpaid may not be equally divided between the resulting shares (*In re. Doloswella Rubber & Tea Estates, Ltd.*, 1917, 1 Ch. 213). In this case the issued share capital of the company consisted of 640 shares of £500 each on which £185 per share had been called up and paid. The Court under Sec. 46 (a) of the English Companies Consolidation Act of 1908, which corresponds to Sec. 55(1)(a) of our Act, sanctioned a special resolution reducing this capital by (a) dividing each issued share of £500 into five shares of £100 each; b) apportioning the £185 called up on each issued £500 share, equally between three of the £100 shares resulting from such sub-divisions leaving a liability of £38-6-8 on each of such three £100 shares, (c) surrendering for re-issue when required the remaining wholly unpaid two shares of £100 each.

The rule as to making the memorandum of association accord with the resolution as soon as the sub-division is effected has to be observed in this case as in all former cases, and a copy of such resolution also has to be filed with the registrar within fifteen days of the date of the passing of the special resolution.

### **Cancellation of Shares.**

In connection with cancellation, a company limited by shares is permitted by sub-clause (e) of Sec. 50(1) to do so, **if so authorised by its articles**. The shares are those which at the date of the passing of the resolution have **not been taken up or agreed to be taken up** by any person. This power is in addition to the power which is specifically given by Sec. 55 for reduction, because in case of this cancellation, confirmation of the Court is not necessary, but the company can act of its own accord in accordance with the provisions of its articles. This cancellation is **not, in fact, a**

**reduction of share capital** under Sec. 35 and thus this power is in addition to the power given by Sec. 55. All other shares cannot be cancelled but can only be reduced under the procedure laid down for reduction (*Sorabji v. Ishwardas*, 1896, 20 Bom. 654; *Bhim-bhai v. Ishwardas*, 1894, 18 Bom. 152).

### **ALTERATION OF CAPITAL REQUIRING SANCTION OF COURT.**

#### **(1) Reorganisation of Capital.**

In this connection the other relevant and important section is Sec. 54. This section runs as follows:—

54. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and every resolution so passed shall bind all shareholders of the class.

- (2) Where an order is made under this section, a certified copy thereof shall be filed with the Registrar within twenty-one days after the making of the order or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

The above section deals with the question of reorganisation of the company's share capital, which reorganisation may include consolidation of different shares of different classes or the division of its shares into shares of different classes. Here the company can bring about either of these acts, if it is a company limited by shares, by first passing a **special resolution** and getting it **confirmed by an order of the Court**. This is, of course, a section which affords a different form of consolidation and sub-division than the one in Sec. 50. A company limited by guarantee having a share capital registered since 1st April, 1914 has power to consolidate its shares.

Sec. 54 limits the general power which otherwise Sec. 153 gives by which under the latter section a company can make arrangements with its members affecting their shares and rights which may include that of consolidation and division. Sec. 54 aims at modification of the conditions in the memorandum either by consolidation of shares of different classes or by division of shares into shares of different classes. Sec. 153 does not apply in cases where there is a mere increase of the number of shares of a class and no consolidation of shares, or division of shares into different classes is in contemplation (*Re. Schweppes Ltd*, 1914, 1 Ch. 322). This section also does not apply in cases where the preferential rights are conferred by articles only and the reorganisation does not involve any modification of the conditions of the memorandum (*Re. Australian Estate & Mortgage Co., Ltd.*, 1910, 1 Ch. 414).

It will be seen from the proviso in Sec. 54 that where this reorganisation affects any special **rights** of any **class** of shares conferred by the memorandum and involves consolidation or sub-division, not only a **special resolution** of the company is required, but a resolution of a **separate meeting of that class** of shareholders who are affected must be passed by a majority in number of that class holding at least three-fourths of the share capital of that class and confirmed by a special resolution. In these cases voting by proxy is allowed where such proxies are allowed by the articles (*Re. Foucar & Co., Ltd.*, 1913, 29 T.L.R. 350). Of course this resolution has to be confirmed by the Court and a certified copy has to be filed with the registrar.

The **difference** between the position created by the utility of Sec. 54 as compared with Sec. 153 is that the former section (Sec. 54) gives inferentially a power to modify preferential rights created by articles of association, with the result that powers given by the memorandum to preferential or any class of shareholders cannot be altered, or interfered with, except upon the conditions laid down in Sec. 54 and on following the procedure as given there. Sec. 153 on the other hand does not give any express authority to

alter capital or interfere with preferential rights (*Re. Doecham Gloves, Ltd.*, 1913, 1 Ch. 226). It should also be noted that Sec. 54 is not an enabling section which limits general powers to make arrangements under Sec. 153. Under Sec. 54, as we have already seen, consolidation and sub-division have only to be dealt with, whereas in other cases where a scheme of arrangement is so framed that it interferes with the rights conferred by the memorandum, a compliance with Sec. 153 is sufficient (*Re. Nordberg Ltd.*, 1915, 2 Ch. 439).

## (2) Reduction of Capital.

With reference to the reduction of capital Sec. 55 (1) expressly lays down that in case a company limited by shares takes any action which involves the reduction of the liability of the shares issued or paid-up, this reduction shall only be made in the following **three cases** subject to the **confirmation of the Court**, if authorised by its **articles**, by a **special resolution** :—

- (a) To extinguish or reduce the liability on any of the shares in respect of share capital not paid-up; or
- (b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

The provision in Sec. 55 (1) (c) also applies to capital which can only be called up in case of a liquidator (*Midland Railway Carriage Company*, 1907, W.N. 175). The resolution under Sec. 55 may provide for the return of capital on the footing that the amount so returned, or any part thereof, may be again called up (*In re, Brown Sons & Co.*, 1931, Crt. of Sess. S. C. 701). When deferred shares were reduced and converted into ordinary shares the scheme was approved though opposed because the articles gave



power to reduce by "paying off or cancelling lost capital, reducing liability on shares or otherwise as may seem expedient." In this case it was also held that the presence of another class of shareholders at a class meeting did not invalidate proceedings as they did not vote either by show of hands or at the poll (*In re. Imperial Chemical Industries Ltd.*, 1936, 1 Ch.D. 587).

The point to be remembered in connection with reduction is that any arrangement concerning the company's capital, which has the effect of reducing the capital, is invalid unless and until it is confirmed by the Court. (*Bhimbai v. Ishwardas*, 1894, 18 Bom. 152). The principle on which the Court acts in connection with reduction of capital is to see that (1) the creditors are not prejudiced; and (2) that the reduction is fair and equitable to the members and as between the different classes of members (*Poole v. National Bank of China, Ltd.*, 1907, A.C. 229). It will be noticed that the section requires that there must be a power in the articles to reduce and therefore it has been held that if the power is contained in the memorandum only, it is ineffective (*Re. Dextine Patent Packing & Rubber Co.*, 1903, 88 L.T. 791). In case the articles do not give this power it is quite open to the company to take that power by altering the articles and in a subsequent meeting by another special resolution authorise the reduction (*Re. Patent Invert Sugar Co.*, 1885, 31 Ch.D. 166). As we have already seen here under Sec. 55 the reduction of capital is quite apart and distinct from cancellation of capital as dealt with in connection with Sec. 50. In connection with this section we have to consider the reduction of issued capital. Of course there is no objection to combine the reduction of unissued capital with that of issued capital, and issued capital may be reduced whether fully paid up or not (*Re. Anglo-French Exploration Co.*, 1902, 2 Ch. 845).

### Procedure as to Reduction.

The procedure as to reduction is that a **special resolution** giving effect to the reduction sought must be passed as provided by the Act. In case the reduction involves a simple cancellation of

shares which were not taken up or agreed to be taken up, all that is necessary is to file a special resolution with the Registrar of joint stock companies in proper time. In all other reductions of capital, the **sanction of the Court** must be obtained through a petition. The Court generally requires a **list of creditors** to be prepared and presented with an **affidavit** by some officer or officers of the company competent to make it verifying the list of names and addresses of the creditors and the nature and amounts of debts due to them.

When the petition comes up for hearing, after hearing any creditor or creditors who may be present to object, the Court would sanction the reduction if satisfied that (1) no creditors are objecting or that in case of objection by a creditor, his consent has been subsequently obtained or that (3) his debt or claim has been discharged or secured. (Sec. 60). Where the creditor **objects** to the reduction, the Court may either (1) dispense with the creditor's consent or where (2) the Court admits the full amount of the debt or claim or, though not admitting, is willing to provide for it, the Court may direct the amount to be secured or when (3) the Court does not admit the claim or is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained, then an amount fixed by the Court may have to be secured as the Court may direct. The fixing of the amount is made after enquiry and adjudication as if the company were to be wound up by the Court. (S. 59).

The company should next produce before the Registrar the order of the Court confirming the reduction and **file** a certified copy of the said order and a minute approved by the Court with the Registrar. The company thereafter has to use the words **"and reduced"** after its name from the date of the presentation of the petition as the last words in it unless the Court has specially sanctioned the company to dispense altogether with the addition of these words which it will do where the Court thinks that the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital. (S. 57).

## CHAPTER V.

## THE ARTICLES OF ASSOCIATION.

**Their Registration.**

We have already seen that the memorandum of association of a company is its charter, whereas, the articles of association form the bye-laws, or regulations, which **govern its internal management** and embody the powers of the directors and officers of the company, as well as those of shareholders or members of the company as to voting, etc. The articles, unlike the memorandum, can be **altered by special resolutions**, but the alterations should be restricted within the scope of the company's powers as laid down by its memorandum. (*Allen v. Gold Reefs of W. Africa*, 1900, 1 Ch. 656). This **statutory right to alter** its articles is one from which the company cannot by any device contract itself out. (*Malleson v. National Insurance and G., Cor.*, 1894, 1 Ch. D. 200; *All India Railwaymen's Benefits Fund v. Baheshwar-nath*, I.L.R. (1945) Nag. 599).

In case a company does not possess a special set of articles of its own, the regulations as laid down in **Table A** which is a Schedule attached to the Companies Act, shall apply. It is further provided that in the case of companies registered with a special set of articles, if the said articles are silent on some points, the provisions or regulations contained in Table A shall apply to the same extent as if they were embodied in its own articles unless in the articles specially framed, there is a clause expressly excluding Table A. In case of companies limited by guarantee, or unlimited companies, the articles of association must be registered with the memorandum of association. There are also instances where companies do not file a special set of articles, but draw out a set of regulations embodying special powers which they wish to reserve, and file it with a declaration to the effect that "Table A shall be the articles of association of this company except in so far

as they are modified by the following rules." The **bulk of companies**, however, **prefer** to be registered with a **special set** of regulations. It may be further added that where articles are not registered, the memorandum has to be endorsed, "registered without articles of association."

Where, however, a special set of articles is prepared according to Sec. 17 (2) of the Indian Companies (Amendment) Act, 1936, *they must contain or in any event shall be deemed to contain regulations, identical with or to the same effect as clauses 56, 66, 71, 78, 79, 80, 81, 82, 95, 97, 105, 107, 112, 113, 114, 115, and 116 of Table A. In case, however, of clause 78 it shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company. In case of clause 107 it shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account unless the company in general meeting shall determine otherwise.*

Care should be taken to **stamp** the articles of association before they are executed and dated (Art. 10, Schedule I, Indian Stamp Act, 1899). The articles of association of bodies not formed for profit need not be stamped. In cases where articles, though improperly stamped, were registered and acted upon for years, they were held to be effectual (*Ho Tung v. Man On Insurance Co., Ltd.*, 1902, A.C. 432 (P.C.); *Kunj Kishori v. Porter*, 1914, 36 All. 416). Articles should be **printed, paragraphed, numbered consecutively and signed by each subscriber** to the memorandum of association *who shall add his address and description.* (S. 19).

### **Their Preparation and Legal effect.**

We have noticed that care has to be taken to see that the regulations provided for in the articles do **not exceed the powers** of the company **as laid down by its memorandum**, nor should

they **violate** the provisions of the **Companies Act**; e.g. if a company were to take powers in the articles to buy its own shares, or to pay dividend out of capital, such powers would be void under the Companies Act. (See *Canji v. The Colaba Press Co.*, 14 Bom. L.R. 521, also 12 App. Case 509; 22 Ch. D. 349).

The actual language of Section 17 runs as follows:—

(1) There may, in the case of a company, limited by shares and there shall, in the case of a company, limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations in Table A, in the First Schedule and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81, and 82, regulation 85, regulation 97, regulation 105, regulation 107, and regulations 112, 113, 114, 115 and 116 contained in that Table:

*Provided that regulation 78 shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company:*

*Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the proportion account, unless the company in general meeting shall determine otherwise.*

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital the articles shall state the number of members with which the company proposes to be registered, for the purposes of enabling the registrar to determine the fees payable on registration.

The articles must be printed and divided into paragraphs. The paragraphs must be numbered consecutively. Each subscriber to the memorandum of association must sign these articles in the presence of at least one witness who must attest his signature. (S. 19). The next point to be noted in connection with the articles is, that both the memorandum and articles **bind the company and its members** as if they had signed and sealed a covenant.

Section 21 lays down that,

- (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and the articles, subject to the provisions of this Act.
- (2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

It should, however, be noted that these regulations bind only the members to their company and *vice versa* but an **outsider** who is not a shareholder, or a shareholder in a capacity other than that of a shareholder, shall **not be entitled to claim the benefit of this section**, e.g., in one case, the articles of association provided that a particular person, say E, should be employed as a solicitor for life, i.e., he could not be removed for his life-time except for misconduct, E actually acted as such a solicitor for some time. Later on, the company removed him and employed some other solicitor. E brought an action for breach of the contract and lost on the ground that the clauses in the articles did not form a contract between E as a solicitor, i.e., in his capacity as a non-member, and the company. Lord Cairns, in the course of his judgment said: "The articles of association, as is well-known, follow the memorandum which states the objects of the company, while the articles state the arrangement between the members. They are an agreement *inter socios* and in that view, if the introductory words are applied to article 118 which was the case in the disputed articles of association it becomes a covenant between parties showing that they will employ the plaintiff. Now, so far as that is concerned, it is *res inter alios acta*, the plaintiff is no party to it. No doubt he thought by inserting it he was making his employment safe as against the company; but his relying on this view of the law does not alter the legal effect of the articles. The article is either a stipulation which would bind the members or else is a mandate to the directors. In either case it is a matter between the directors and shareholders and not between them and the plaintiff." (*Eley*

*v. The Positive Govt. Security Life Assurance Co., Ltd.*, 1876, 1 Ex. D. 1). The corresponding Indian case is *The Ahmedabad Jubilee S. & M. Co. v. Chotalal Chhaganlal*, 10, Bom. L.R. 141, On the same principle it was held in the case of *Rotheram Chemicals Co.*, 1884, 25 Ch. D. 103, that where the promoters engage a solicitor to assist them in the course of the promotion, and that, in the articles of the company it was laid that all expenses incurred in the course of the promotion of the company shall be paid by the company, it was held that in spite of such a clause, the promoters and the solicitor could not recover the expenses. This is so irrespective of the fact that the outsider who sues the company depending on a clause in the articles in the above case, happens to be a shareholder also. (See also *Melhado v. Porto Alegre N. H. R. Co.*, 9 C.P. 503).

### **Rule in Royal British Bank v. Turquand—Doctrine of Indoor Management.**

It is further laid down that, every person who deals with the company is **expected to be familiar with the contents of its articles** of association, **and** ought therefore, to know what limitations are laid down there (*Royal British Bank v. Turquand*, 1856, 6 E. & B. 327). See also *Hope Mills, Ltd. v. Sir Cawasji J. Readymoney*, 13 Bom. L.R. 162, where it was laid down that "outsiders dealing with a company are bound to acquaint themselves with its external position which can usually be gathered from the papers of their constitution, **the memorandum** of association and the articles of association; but are not bound to inquire into and satisfy themselves upon all the details of the company's indoor management." Thus so long as the act done is not inconsistent with the Memorandum and Articles, outsiders are not bound to inquire whether all the necessary steps have been taken i.e., they are entitled to assume that directors have acted properly (*Royal British Bank v. Turquand* (1856) 6 E. & B. 327). It is, however, held in *re. Anglo-Austrian Printing & Publishing Union, Isaacs' Case*, 1892, 2 Ch. 158, that the articles may indicate the terms upon

which a member, or an outsider, has agreed to deal with the company. In this case the articles laid down that, one Sir Henry Isaacs, and others, shall be first directors of the company, and it was further laid down by the articles that the qualification of a director was to be the holding of shares to the nominal amount of £1,000. Sir Henry Isaacs had signed the memorandum and articles for one share and acted as a director, but he never applied for any shares nor were they allotted to him. He was also not registered as a member of the company. It was held that, under these circumstances, he may be taken to have agreed to take a qualification share and pay for it.

According to the **rule in Foss v. Harbottle** (1843) 2 Hare, 461), followed in India in *Bhujekur v. Shinker* (36 Bom. L.R. 483), the Court will not as a rule interfere, at the instance of a shareholder or of a minority of shareholders, with the internal management of a company where the acts themselves are within the powers of the company.

### Alteration of Articles.

It must be noted that, **by altering its articles, the company cannot break its existing contracts.** In the words of Vaughan Williams, L. J. in *Allen v. Gold Reefs of West Africa*, 1900, 1 Ch. 656 "A resolution may alter the regulations of the company, but **cannot retrospectively affect existing rights.** I take it to be clear that the alterations must be made in good faith, and I take it that an alteration in the articles which involved oppression of one shareholder would not be made in good faith." The effect of this decision is that, the alteration, if effected for the benefit of the company as a whole, will be good, as long as the provisions of the memorandum are not exceeded. Of course, an alteration which is not *bona fide*, and not in the general interest of all, or is oppressive, will not be allowed; as for example, a majority attempting to commit a fraud on the minority.

We have already seen that the articles as originally framed should not be opposed to any provision of the Companies Act. In



connection with the alteration of the articles the same rule applies and the alteration of an article in variance with the Act will be invalid and inoperative. In one case where the articles provided to the effect that a shareholder shall not present a petition to wind up the company, except under certain circumstances it was held that having regard to the section of the Act which specifically provides that such a petition may be presented "by any one or more contributory or contributories" the alteration was "really an attempt to fix upon the holder of every share, an obligation running with the share, in contravention of the provision of the Act" which the company had no right to enact. (*In re. Peveril Gold Mines, Ltd.*, 1898, 1 Ch. 122).

The articles of association can be altered by a **special resolution**. In this connection Sec. 20 lays down as follows —

(1) Subject to the provision of the Act and to the conditions contained in its memorandum, a company may, by special resolution, alter or add to its articles; and any alteration or addition so made, shall be as valid as if originally contained in the articles and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in the Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

It may be added that **Sec. 20A** further provides that notwithstanding anything in the memorandum or articles of a company **no member** of a company shall be **bound by an alteration** made in the memorandum or articles after the date on **which** he became a member, if and so far as the alteration **requires him to take or subscribe for more shares** than the number held by him at the date on which the alteration is made **or** in any way **increases his liability** as at that date to contribute to the share capital of, or otherwise to pay money to the company. This, of course, does not

apply where a member agrees in writing to be bound by the alteration. This section thus protects members from being saddled with liability on their shares other than that originally fixed through a special resolution. The only way in which they can be bound is by an agreement in writing taken from them.

Section 20 virtually speaking gives wide powers as far as alterations and additions go, and that too, without any sanction of the Court being necessary, the only check being the provision of Sec. 20A of the Act referred to above and the terms of the memorandum. This **power of alteration cannot be taken away** from the members by a clause in the articles. In short a company **cannot contract not to alter** its articles (*Walker v. London Tramways Co.*, 1879, 12 Ch. D. 705; *Punt v. Symons*, 1903, 2 Ch. 506; *Mutieson v. National Insurance & Guarantee Corporation*, 1894, 1 Ch. D. 200; *All India Railwaymen's Benefits Fund v. Bahe-shwarnath*, I. L. R. (1945) Nag. 599). The **only limit**, if at all, to the **alteration** in the articles happens to be in cases where (1) the alteration constitutes an **oppression or fraud on the minority** (*Brown v. British Abrasive Wheel Co.*, 1919, 1 Ch. 90); or where (2) the articles of association are being altered for the purpose of committing a **breach of contract** (*British Murac R. S. Limited v. Alpertown R. Co., Ltd.*, 1915, 2 Ch. D. 186). It should however be remembered that when giving notice to members for calling a meeting with a view to alter articles of association, non-disclosures of important particulars in the notice would render the resolution giving effect to the alteration void. This is on the principle that there should be **full and fair disclosure** to the shareholders of the facts upon which they were asked to vote (*Narayanlal Bansilal v. The Manekji Petit Mills Co., Ltd.*, 1931, 33 Bom. L.R. 556). The alteration of the articles may be done with retrospective effect so long as the same is exercised for the benefit of the company as a whole (*Allen v. Gold Reefs of West Africa*, 1900, 1 Ch. 656). This is, however, subject to this that no majority of shareholders, by such alteration can retrospectively effect to the prejudice of non-consenting shareholders the rights which they

already possess under the contract (*James v. Buena Ventura Nitrate G. Syndicate Limited*, 1896, 1 Ch. 456, at page 466; *Welton v. Saffery* 1897, A.C. 299 at page 309).

### **Alteration of Articles to deprive the Rights of a Class.**

As to whether the majority can, by altering the articles take away future rights of a class which are only attached by the articles is a difficult question. The principle of general application is that as a shareholder is presumed to know that the rights conferred by the articles are subject to alteration provided by law, he cannot complain unless he can show that the alteration sought to be effected is either—(1) breach of a separate contract made with him or with his class, or (2) that it is not made *bona fide* or for the benefit of the company as a whole. (*British Equitable Assurance Co., Ltd., v. Bailey*, 1906, A.C. 35 per Lord Macnaghten, p. 36). In case there is a **mistake in the drafting of the articles**, the correct course is to alter the articles under the powers given under the sections and not to apply to the Court to exercise its jurisdiction to rectify the mistake. The Court would only interfere to set right an injustice in case where a set of shareholders prevented the rectification of such a mistake wrongfully by their votes (*Evans v. Chapman*, 1902, W. N. 78).

The principle that the articles cannot be altered with a view to break a contract or deprive any party of his contractual rights will apply to a contract with an outsider also (*British Rubber Syndicate v. Alperston Rubber Co.*, 1915, 2 Ch. 186). Finally it should be remembered that the **articles of association cannot be rectified by the Court** for the simple reason that they have a statutory operation and the Court has no jurisdiction to do this (*Evans v. Chapman*, 1902, 86 L.T. 381).

The important principle is that every **shareholder** is presumed to have purchased his shares with the full knowledge of the contents of the articles and thus cannot **restrain their alteration** even though to his prejudice (*Allen v. Gold Reefs of West Africa*,

1900, 1 Ch. 656). The only grounds open to him according to this case are that (1) the alteration would amount to a **breach of his contract** (*Hari Chandra Joga Deva v. Hindustan Co-operative Insurance Society Ltd.*, 1925, 52 Cal. 239); or that (2) it was **not bona fide** for the benefit of the company as a whole.

### **Procedure for Alteration.**

The Secretary should first draft the resolution (where necessary in consultation with the company's lawyer) and get it approved by the Board of Directors. At this meeting he should also get a resolution passed authorising him to call the necessary meeting for the special resolution altering the articles to be considered. The notice calling the meeting must specify the material alterations effected by the altered article. (*Normandy v. Ind. Coope & Co.*, 1908, 1 Ch. 84). After the necessary resolution is passed a printed copy of the resolution signed by the chairman should be sent to the registrar for being registered and the new article should be inserted in every copy of the articles of association issued thereafter.

### **The Bye-Laws.**

Frequently articles grant powers to the directors to "make, vary and repeal" bye-laws. So far as these bye-laws are to be made with reference to the servants of the company or its officers or the conduct of its business there is no objection to such a power. In case of regulations however "for the members" the best opinion is that they are "regulations for the company" and should therefore be passed by a special resolution of members.

### **Member's Right to Copy.**

Every company is bound to send to every member, if so requested, a **copy** of its memorandum and articles of association. For this purpose the company may make a charge not exceeding one rupee a copy. Failure to comply with this requirement is likely to entail a fine on the company of not more than Rs. 10, for each offence. (S. 25).

**Ultra Vires Articles.**

In the drafting of the articles care should be taken to see that powers which **contravene the memorandum or the principles of company law** are not taken. There have been cases where articles purporting to confer on the company the power to buy its own shares or to pay dividends out of the capital or to extend the objects by special resolutions have been declared void and ineffectual. (*Trevor v. Whitworth*, 1888, 12 A.C. 409; *Guinness v. Land Corporation of Ireland*, 1883, 22 Ch. D. 349; *Ashbury v. Riche*, 1875, L.R. 7 H.L. 653). However, it has been held that if there happens to be an ambiguity in the memorandum, the articles which have been registered at the same time as the memorandum, may be referred to, to solve or explain the same (*Southern Brazil Rio Grande do Sul Rly.*, 1905, 2 Ch. 78).

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## CHAPTER VI.

## THE PROMOTION AND PROSPECTUS.

## The Promoters.

We have already seen that the persons who take an active part in promoting, or bringing into existence, a joint stock company are known as promoters. "The term promoter is a term not of law but of business, usefully summing up in a single word, a number of business operations, familiar to the commercial world, by which a company is generally brought into existence." (*Whaley Bridge Printing Co. v. Green*, 1880, 5 Q.B.D. 109). It will thus be seen that it is **not necessary** that a promoter should be a person **officially connected** with the company. On the other hand, *Cockburn, C.J.*, lays down that he is one who "undertakes to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose." (*Twycross v. Grant*, 1877, 2 C.P.D. 469 at p. 507). These promoters generally get the original documents, like the memorandum and the articles as well as the prospectus prepared, take an active part in the selection of directors, as well as in the purchase of property by the company for the purpose of carrying on its proposed business, and generally speaking, **float or assist in floating**, a company, or do any one or more of these operations. The vendors of the property to a company generally take up the position of promoters, particularly where they assist in the work of the floatation of the company. The promoter should not be mixed up with other servants and agents of the company who take a subordinate part in its floatation such as the secretary or the solicitor.

## The Legal Position of Promoters.

On this point the leading case is that of *Erlanger v. The New Sombrero Phosphate Co. and others*, 3 App. Cas. 1218, where Lord Cairne expressed himself as follows:—"They stand in my opinion undoubtedly in a **fiduciary position**. They have in their

hands the creation and moulding of the company ; they have the power of defining how, and when, and in what shape, and under what supervision it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life become, through the managing directors, the purchasers of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a Board of Directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote or form a joint stock company and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to this company through the medium of a Board of Directors who can and do exercise an independent and intelligent judgment on the transaction."

The promoters, being in a fiduciary position, are accountable to the company just like **agents or trustees**—(*Lydney Co. v. Bird*, 1886, 33 Ch. D. 85 ; *Mann v. Edinburgh Tramways*, 1893, A.C. 69). The promoters' **remuneration** may be (1) commission from the vendors of the assets or business ; (2) profits on the property originally purchased by promoters and then sold to the company ; (3) commission on shares sold or for which they procured subscription ; (4) a lump sum, or (5) in any other form. Of course these should be fully disclosed in the prospectus as they **cannot make secret profits** being in a fiduciary position and must get them passed by an independent Board of Directors (*Gluckstein v. Burnes*, 1900, A.C. 240), otherwise the company can rescind the contract. (*Leeds Theatre*, 1902, 2 Ch. D. 809). In case the promoter had acquired the property after he became a promoter, the company has the option either of rescinding the contract or of retaining the contract to claim profits for itself (*Bank of London v. Tyrrell*, 1862, 10 H.L.C. 26). The position in law with regard to the property they sell to the company which belongs to them is that, if the promoter

acquired the said property with the original intention of ultimately forming a company and of selling the property to it at a profit, the promoter would not be held accountable for the profit he makes on the re-sale, provided the fact is disclosed that the property which the company is to acquire is the property of the promoter who is the vendor (*Bentinck v. Fenn*, 1887, 12 A.C. 652; *Ladywell Mining Co., v. Brookes*, 1887, 35 Ch. D. *Gover's case*, 1876, 1 Ch. D. 182). The same would be the case if the property acquired prior to the formation and incorporation of the company was not actually transferred to the name of the promoter, but was in the form of an optional or uncompleted contract according to *Gover's case* as well as the case of *Ladywell Mining Co.*, cited above. In another case, viz., *Omnium Electric Palaces v. Baines*, 1914, 1 Ch. 332 where there were only negotiations for a lease which resulted in a lease, the position was declared to be the same. The position, however, would be different where the promoter enters into contracts after he began to promote the company, because the benefit of all contracts entered into by him after his position as a promoter was begun or after he began to act as a promoter, would belong to the company according to *Ladywell Mining Company's case* cited above. If the contracts are entered into after the company is incorporated, naturally the promoter stands in the position of an agent to the company and cannot make secret profits of which his principal is not informed (*Morison v. Thompson*, 1874, L.R. 9 Q.B. at p. 484).

To sum up, as the promoter stands in a fiduciary position, he must disclose the fact that he is himself the seller of the property which he has acquired. If he does not, the company would be entitled to rescind the contract and where the property is acquired after he began to work as a promoter, he would be compelled to account for the profits made by himself.

As we have already seen, the promoter has to account for secret profits and if these are not disclosed under the circumstances discussed above, the measure of damage is the actual profit



made by the promoter, less any reasonable expenditure he may have incurred or paid. In other words, the measure is based upon net profits made by him (*Leeds & Hanley Theatre of Varieties*, 1902, 2 Ch. 809).

### **Acquisition of a running Business.**

We have thus seen exactly what is the legal position of promoters. Promoters may form a company on the basis of some concessions, or acquire a running business with a view to enlarge its scope, or form an entirely new company to start an entirely new business. For acquiring an old business a detailed enquiry has to be made as to the value of the assets which are to be taken over, the liabilities and the past profits for which experts have to be engaged who have to go into these questions in detail and report or certify the results of their investigations. The expression "**expert**" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him [S. 100 (5) (b)]. These certificates of experts are of considerable value in connection with the statements in the prospectus, because the promoters and directors are responsible for any mis-statement, or wrong statement made in the prospectus on their responsibility, whereas if they were to rely upon the report of experts and if the statements made are extracts and quotations from these reports or certificates, they are safe and well fortified. Thus accountants, engineers, architects etc., will have to be engaged for specific work suitable to their professional ability. The usual practice in such cases is to enter into agreements under which the vendors of these businesses agree to receive in consideration of the sale of the property, a certain amount in cash and a certain amount in fully or partly paid shares.

In some cases, the vendors also agree to pay "underwriting commission", or a part of the the preliminary expenditure. The vendors may either join the Board of Directors or may not. It is frequently necessary, particularly where goodwill of the business is also transferred, to see that in their agreement a specific

clause is inserted preventing them from carrying on the same type of business within a certain radius and for a specific number of years. It may be that the business carries with it patented inventions, trade marks, secret processes, registered patterns, etc., in which case they have to be transferred to the company through this agreement.

### **Preliminary Agreements.**

When a company is being formed certain agreements have to be made with a view to purchase property, secure the services of managers and other experts, and to procure certain rights or privileges, etc. In such cases the promoters naturally do not wish to meet the expenses and responsibilities of forming a company unless they can obtain binding contracts from the owners of the business they propose to acquire or for the concessions or services of which they want to make sure. The **difficulty** arises from the fact that a company which has not come into existence cannot enter into binding contracts made by any one who acts as its agent or trustee prior to its incorporation. Even if the contracts are ratified after incorporation the **ratification is not legally binding** but the **proper course is to make a new contract after incorporation** in terms of the old contract. (*Natal Land & Colonization Co., Ltd. v. Paulin*, 1904, A.C. 1203; *Baraset B. Rly. Co. v. Dist. Board*, A.I.R. (1946) Cal. 23). It has been also held that the **person signing** such contracts as "agent" or "trustee" will remain **liable personally** even after such ratification. Thus in order to get over this difficulty the **practice now followed** is to provide in the contract which is entered into to the effect that in case the company after registration enters into a fresh contract in terms of the old contract and thus adopts the original agreement, the liabilities and responsibilities connected therewith shall cease, but if the company does not thus adopt it within a specified time, the promoters shall have the option to rescind the contract. After the company is duly incorporated a new agreement in the same terms is prepared which is adopted by the directors and signed on behalf of the company.

It may be added that in these cases in the **articles of association** also a **clause** is inserted under 'the heading of "**preliminary contracts**". The clause lays down to the effect that the company shall forthwith enter into an agreement with Messrs. X. Y. & Z. marked for identification by the signature of Mr. A. B., the lawyer of the company with or without such modifications as the directors may think proper. In cases where the vendor himself acts as the promoter of the company, the practice usually followed is to prepare a draft agreement for the sale of the property before registration of the company, and to incorporate a power in the memorandum entitling the company to enter into and carry into effect an agreement with or without such modification as the Board of Directors think best as soon as the company comes into existence. A similar clause is also entered in the articles as we have seen above.

### **Promoter Companies.**

Frequently one company promotes another under the Indian Companies Act of 1913. There are occasions when a special promoting company with limited liability is formed by a syndicate with the specific object of forming some particular company. Here the promoters arrange to hold shares in the promoting company, but as soon as the company they projected to promote is floated, the promoting company is wound up and the net proceeds are distributed among the shareholders, *i.e.*, the members of the syndicate. This course is adopted with the **two-fold object** of concealing the identity of the promoters, and at the same time of protecting themselves against personal liability and other dangers. This object is effectively achieved as far as civil liability is concerned, because shareholders of this promoting company are not personally liable for contracts made by the promoting company which, as we have noticed, is a limited company, but where the promoting company commits a breach of duty or fraud, the directors of such company are liable personally. On the same footing the directors of this promoting company will be liable for not disclosing in the prospectus

profits made by the promoting company because that course is tantamount to a breach of trust or fraud (*Emma Mining Co. v. Grant*, 1881, 17 Ch. D. 122; *Barnes v. Addy*, 9 Ch. D. 244). If, however, this syndicate has made illicit profits from the company so promoted, such profits could be followed even in the hands of members of the promoting company.

### THE PROSPECTUS.

The prospectus is **defined** by Sec. 2 (14) as " any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase, any shares or debentures of a company *but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed.* The words in italics were added by our Companies (Amendment) Act of 1936 and do not find a place in the English Companies Act of 1929

A prospectus is generally issued where it is intended to **appeal to the public** for subscription of share capital. A **private company cannot issue a prospectus** or file a statement in lieu of prospectus, since it cannot invite the public to subscribe for shares; but in the case of a **public company**, it is laid down that the prospectus **must** be issued in a proper form giving such information as is laid down by the Act, or in the absence of such issue, a **statement in lieu of prospectus** duly signed by every person who is named therein as director or proposed director of the company, or by his agent duly authorised in writing, shall be filed for registration with the registrar on or before the date of its publication. No such prospectus shall be issued unless and until such a copy is filed, otherwise, every person who is knowingly a party to such issue will be liable to a fine not exceeding Rs. 50, for every day from the date of the issue of the prospectus until the date when the copy is filed (Sec. 92).

It is further enacted that if a public company does not issue a prospectus as above stated, it shall not allot its shares or

debentures, unless at least a statement in lieu of prospectus as above stated is filed (Sec. 98). An allotment in contravention of this section is now voidable at the instance of the allottee within the period specified in section 102. It will thus be seen that the important point in this connection is that there should be a public issue, *i.e.*, an invitation to the public to take up shares of the company, and therefore, this rule does not apply to a circular, or notice, inviting existing members, or debenture-holders of the company, to subscribe either for shares or debentures of the company (S. 93(3)).

A prospectus is **not an offer** to the public in the sense that its acceptance would create a binding contract. It is deemed to be **merely a notice** of the willingness of the company to receive applications from the public made according to the terms stated in the prospectus. Thus the application for shares made by the potential shareholder constitutes the offer which may be accepted or rejected by the company.

It was held in *Booth v. New Africander Gold Mining Co., Ltd.*, 1903, 1 Ch. 225, that an offer to the members of an old company, of shares of the new company which was merely a re-construction of the old concern, was not an offer to the public. In another Scottish case where a promoter sent through his friends and customers an offer to purchase shares, it was held that the said offer was not made to the public. In *Sherwell v. Combined Incandescent Mantles Syndicate*, 1907, 23 T.L.R. 482, where the prospectus was printed by a set of promoters and marked "strictly private and confidential, not for publication", it was held that it was not issued to the public. In this case it was further laid down that in order to constitute an offer to the public the offer should be made to any one who chooses to come in and apply for shares. In (*Pramatha Nath Sanyal v. Kali Kumar Dutt*, 52 Cal. 440), it was held that an **advertisement** offering the public shares in a company is a "prospectus" under Sec. 2 (14) of the Indian Companies Act and omission to file a copy thereof with the registrar of com-

panies before publication is an offence under Sec. 92(5) of Act, though such prospectus refers to a prospectus a copy of which has already been filed.

### Its Contents.

The next point to be considered is the one with regard to the contents of the prospectus. **Great care and ingenuity** have to be exercised here **in preparing the draft**, because not only has the prospectus to be drafted in a manner which should appeal to the public, but various special requirements of the Company Law are to be particularly observed in this connection, failing which the promoters, directors, and all other officers, taking part directly or indirectly in the promotion, may incur liability, on the ground that statements made in the prospectus were either incorrect or misleading, or that certain points required by the Company Law to be included were omitted. The new Indian Companies (Amendment) Act of 1936, in relation to prospectuses issued by Indian companies in India further lays down that *if a prospectus is issued which does not comply with the provisions of Sec. 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding Rs. 50 for every day from the day of the issue of the prospectus until a copy complying with the requirements of Sec. 93 is filed; of course if the noncompliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all circumstances of the case reasonably to be excused, the directors or persons responsible for the issue of such prospectus may not incur any liability by reason of such non-compliance or contravention.* (S. 97).

Sec. 93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

- (a) the contents of the memorandum, with the names, descriptions and addresses of signatories and the number of shares subscribed for by

- them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company (and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption); and
- (b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
  - (c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers (and managing agents or proposed managing agents (if any) (and any provision in the articles or in any contract as the appointment of managers or managing agents and the remuneration payable to them), and
  - (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and
  - (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and
  - (ee) (where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations); and
  - (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor; Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

- (f) *(where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years as far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus); and*
- (g) the amount (if any) paid or payable as purchase money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good-will; and
- (h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscription, for any shares in, or debentures of, the company, (or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents): Provided that it shall not be necessary to state the commission payable to sub-underwriters; and
- (i) the amount or estimated amount of preliminary expenses; and
- (j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (k) the dates of, and parties to, every material contract (*including contracts relating to the acquisition of property to which clause (f) applies*), and a reasonable time and place at which any material contract or a copy thereof, may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract (*except a contract appointing or fixing the remuneration of a managing director or managing agent*) entered into more than two years before the date of issue of the prospectus; and
- (m) the names and addresses of the auditors (if any) of the company; and
- (n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as a director, or otherwise for services



rendered by him or by the firm in connection with the promotion or formation of the company, and

- (e) whether the company having shares of more than one class the right of voting at meetings of the company conferred by *and rights in respect of capital and dividends attached to* the classes of shares respectively and
- (f) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend *or vote at* meetings of the company or of the right to transfer *share*, or upon the directors of the company in respect of their powers or *management*, the nature and extent of those *restrictions*

(11) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1) namely

- (a) a report by the auditor of the company with respect to the profit of the company including its subsidiary companies so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the *dividends* if any paid by the company on each class of shares in the company for each of the said three years giving particulars of *such* each class of shares on which such dividends have been paid and the *dividend* *thereon* such dividends have been paid and particulars of the *dividends* and *dividends* have been paid on any class of shares for any of those years and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus containing a statement of that fact
- (b) if the proceeds or any part of the proceeds of the issue of shares or debentures are to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in Sec. 114 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus

Provided that if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two or any shorter period, this sub-section shall have effect as if references to three years or such shorter period were substituted for references to three years.)

(12) The statement referred to in clause (ff) of sub-section (1) and the report referred to in sub-section (1A) with reference to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto including income or profits having no relation to the trading for the period covered and

*including also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.)*

(1C) *Where any part of the sums for the matters set in sub-section (2) of Sec. 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof)*

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the content of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, description and addresses of directors or proposed directors, and of managers or proposed managers and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

*(Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of Sec. 154).*

(b) Nothing in this section shall limit or diminish any liability which any person may incur under the general law of this Act apart from this section.

## **Directors' Qualification.**

There is **no compulsion** in the Company Acts that directors should hold a certain number of shares as qualification shares ; **but if a clause** is inserted in the **Articles** of the company providing for such a qualification, then, such qualification must **be stated in the prospectus**. The usual practice is to provide for such a share qualification, so that public confidence may be inspired by the fact that directors are to be personally interested in the fortunes of the company. **If no such clause** is in the Articles, the provisions of **Table A viz ;** that every director must hold at least one share in the company, apply **unless** such provisions are **expressly excluded** by the company.

### Directors and Managing Agents.

With reference to the directors, managing agents and managers the **Indian Sec. 92(1)(c)** besides requiring the names of the directors and of proposed directors and of managers or of proposed managers as in case of English Law also *requires of managing agent or proposed managing agents if any to be disclosed*. It also requires that the *provisions if any in the articles or in the contract as to to the appointment of managers and managing agents and the remuneration payable to them should also be disclosed in the prospectus*. This has been added by the Amending Act of 1936. This new addition was necessitated because the Amending Act now defines managing agents, as we shall see later, and special provisions are now inserted in our Indian Act with regard to managing agents and their rights and responsibilities which were not to be found in the old Act. The managing agents are a peculiar product of Indian practice for which no provision up to now was made in our Act and hence this addition was decidedly an improvement.

### Minimum Subscription.

Under the **old Act** it was necessary only to mention a sum in the prospectus as "minimum subscription" and as soon as this was applied for, the directors could proceed with allotment. The actual figure was left to the option of the promoters and directors. It was hoped that the promoters would be tempted to put in a fairly substantial amount with a view to inspire confidence and that if they put in an absurdly small amount, on which they purported to proceed to allotment, the public would hesitate to apply. However, in practice it was discovered that in good times, and in many cases in normal times also, this safeguard was inoperative and insufficient. The reckless attempt to promote all sorts of companies and to float them with insufficient capital continued and simple-minded people were, in one form or another, enticed into purchasing shares even in the case of companies openly floated with insufficient finance.

The **Greene Commission** of 1925-26 in its **Report** on Company Law Amendment of England lays down that "the existing law as to minimum subscription has become in practice useless owing to the low minimum which is usually fixed in articles of association. We consider that an alteration in the law should be made so as to bring it as nearly as possible within the original intention of the legislature". Thus now our **Amended Companies Act** in Sec. 101 (1), (2) and (2a) lays down that :—

(1) **No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent thereof has been paid to or received in cash by the company.**

(2) **the matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely :—**

- (a) **the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue.**
- (b) **any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscription for any shares in the company,**
- (c) **the repayment of any moneys borrowed by the company in respect of any of the foregoing matters, and**
- (d) **working capital.**

(2A) **The amount referred to in sub section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.**

The same Sec. 101 (3C) further lays down that :—

**In the event of any contravention of the provision of sub-section (2B) every promoter, director or other person**

*knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.*

The **object** sought to be achieved by these provisions of Sec. 101 is to prevent the formation of what are called "**mushroom companies**" with insufficient finance.

### **The fully or partly paid Shares.**

The Act makes it compulsory to state the number of shares, or debentures, which are proposed to be issued by the company as fully or partly paid up, and it is required further, that the consideration for such issue should also be stated in the prospectus. It is also provided by Sec. 104 (b) that in cases where fully or partly paid shares are allotted, the company shall produce for the examination and inspection of the registrar, a contract in writing, showing the title of the allottee to the allotment together with any contract of sale, or service, or any other consideration, for which the said shares were allotted. This contract has to be duly stamped. In case of default, every officer of the company who is knowingly a party to the same shall be liable to a fine not exceeding Rs. 500, for every day during which the default continues. This rule has been based upon the other rule of law which lays down that shares cannot be issued at a discount except under the conditions and stipulations laid down in the Companies Act of 1929 (in England) and the Amending Act of 1936 (in India).

### **The Vendors and the Purchase money.**

A vendor is **defined** by Sec. 94 of the Act as one—

"who has entered into any contract, absolute or conditional, for the sale or purchase, or of any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase money is not fully paid at the date of issue of the prospectus; or
- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (c) the contract depends for its validity or fulfilment on the results of that issue."

Where the property to be acquired by the company is to be taken on lease, the expression vendor will also include lessor and the expression purchase money shall include the consideration for the lease and the expression sub-purchaser will include sub-lessee. (S. 95).

With regard to vendors who sell to the company property which has been originally purchased in their own name, the section now requires that **complete disclosure** should be made of their names and addresses and also of sub-vendors together with a statement as to the amount which each one of them has to receive in cash or debentures. It is further laid down that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors. That was the position in the old Indian Law and is still the position in the present English Law. *The Amending Act of 1936 however has now further provided that in case of prospectuses issued by our Indian companies where any property sold by the vendors and acquired by the company has within two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser on each such transfer so far as the information is available should be disclosed. It is further laid down that where any such property is business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available should be disclosed. In addition to that the balance sheet of the business concerned made up to a date not more than 90 days just before the date of the issue of the prospectus must be appended to the prospectus.*

### **Underwriting Agreement and Commission.**

A person or persons, or a syndicate, may enter into an agreement called an underwriting agreement, by which they **undertake in consideration of a certain commission** being paid to them

on the capital offered for public subscription, **to take up and pay for such of the shares as are not taken up by the public.** The **object** of these agreements is (a) **to ensure the financial safety of the floatation** of the company, *i.e.*, to make sure that the company will have **sufficient working capital** in order to carry on the business of the company, and to let the persons who subscribe for shares know that **at least the amount underwritten** will be forthcoming.

With regard to underwriting agreements, the leading case is *Re. Licensed Victualler's Mutual Trading Association*, 1889, 42 Ch. D. 1. Here in the opinion of *Cotton, L. J.* an **underwriting agreement** is "an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole or the number mentioned in the agreement, the underwriter will, for an agreed commission, take the allotment for such part of the shares as the public has not applied for." In the same case *Lindley, L. J.* also expressed himself thus;—"Underwriting in this connection in business means agreeing to take so many shares more or less in number as are specified for them. There is no doubt now that this is the meaning of underwriting."

This old aspect of law has now been altered by subsequent enactment, *viz.*, Sec. 105 of the Indian Act which now permits underwriting commission being paid to all who "subscribe or agree to subscribe for shares" and that too "whether absolutely or conditionally". An "absolute" agreement is with an original allottee, a "conditional" one with an underwriter. The following condition must, however, be fulfilled —

- (1) the payment must be **authorised** by the Articles,
- (2) it should **not exceed** the amount or rate authorised by the Articles,
- (3) the amount or rate should be **disclosed** in the prospectus or statement in lieu of prospectus, and
- (4) the payment must be **strictly** by way of commission and not merely a device to issue shares at a discount.

The **English Act** contains similar provisions (*viz.* Sec. 89, 90 and 26).

Our new Indian (Amendment) Act lays down *that where any issue of shares or debentures is underwritten the names of the underwriters and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations must also be stated in the prospectus* (S. 93 (1) (ee)). This was made necessary because some of the promoters underwrote shares with men of straw and it was thought that the investors ought to know exactly who the underwriters were so that they could make investigation as to their financial stability before they applied for shares. It may be further added that besides *shares, debentures can now be underwritten on the same footing as the underwriting of shares.* (S. 128). We have seen that the **underwriting commission must be disclosed in the prospectus** in case of underwriting of both shares and debentures but where a prospectus is not issued it is not necessary to disclose underwriting commission on debentures to be paid, in the statement in lieu of prospectus. The underwriting commission is **also** required to be disclosed in the **annual summary** (S. 32 (2) (f)).

Sometimes the underwriter enters into subsidiary contracts with other persons to relieve him of some or all of his liabilities for a commission. This **sub-underwriting commission need not be disclosed in the prospectus.**

**Brokerage** is commission paid to a broker for placing shares i.e., for finding other persons who will take them. A reasonable brokerage has always been allowed but placing is **not equivalent to underwriting** as a person failing to place shares is not bound to take them himself.

### Shares at a Discount.

The Indian Companies Amendment Act of 1936, Sec. 105A introduces an **innovation** as far as the Indian Companies Act is concerned, inasmuch as that section adopts Sec. 47 of the English



Companies Act of 1929 permitting companies to issue shares at a discount. This innovation was recommended in England by the **Greene Committee** report of 1925-26 on the ground that there was an overwhelming body of commercial opinion in favour of giving companies this power and the Committee itself thought that in many cases such a power would be extremely useful

According to Mr. L. Cuthbert Cropper, F.C.A., Chartered Accountant, in his book on Higher Book keeping and Accounts (5th edition), page 352, "the powers thus given by the Act may be useful where a company requires further capital at a time when its shares are quoted below par, since the existing members or new subscribers naturally would not be willing to pay for new shares under such circumstances, but might be willing to subscribe at the market price, or at a price slightly below market price."

Though of course according to old decisions the issue of shares at a discount in England also was declared to be illegal, in actual practice this issue of shares at a discount in some measure was **indirectly done** under the old Act **in the guise of paying under-writing commission** to those who agreed to subscribe for the shares. It is **now lawful** for a company to issue shares at a discount provided :—

- (1) the shares are of a class already issued,
- (2) the issue at a discount is authorised by a **resolution** passed in a general meeting of the company,
- (3) it is **sanctioned by the Court**,
- (4) the resolution **specifies the maximum rate** of discount (**not exceeding ten per cent** in any case) at which the shares are to be issued,
- (5) not less than **one year**, at the date of issue, has elapsed since the date on which the company was entitled to commence business, and
- (6) the shares to be issued at a discount are issued **within six months** (one month in **English Law**) after the date on

which the issue is sanctioned by the Court or within such extended time as the Court may allow.

A further condition imposed is that every **prospectus** relating to the issue of shares **and every balance sheet** issued by the company subsequently through the issue of the shares, must contain particulars of the discount allowed on the issue of the shares or of so much of the discount as has not been written off on the date of the issue of the document in question. The penalty imposed in default in connection with the complying with Sec. 105A (ii), *i.e.*, with regard to the prospectus as stated above, is a fine not exceeding Rs. 50. (Sec. 105A (iii).) It should be noted that **forfeited shares** may be re-issued at a discount.

### **Preliminary Expenses.**

The next point which the Act requires the prospectus to narrate is the **estimate** of the preliminary expenses. This item includes **expenditure incurred in connection with the promotion and floatation** of the company. It includes costs of preparing, printing and advertising the prospectus, the memorandum of association, the articles of association, shares and debenture certificates, letters of application and allotment, stamp duties, debenture trust deeds, the costs of original books, the company's seal, and the fees of valuers and other experts engaged in connection with the promotion.

### **Dates and parties to every material contract.**

Here, what is wanted is that every contract which is likely to influence the judgment of any person intending to apply for shares, ought to be stated. (*Sullivan v. Metcalfe*, 1880, 5 C.P.D. 455). This would include oral contracts also. The only contracts that need not be stated in the prospectus are those entered into in the ordinary course of business, or those entered into two years previous to the date of the prospectus. It is further required that a reasonable time and place at which these contracts can be inspected by any applicant should also be stated.

**Names and addresses of auditors.**

The names and addresses of auditors are also required to be stated in the prospectus. Under Sec. 144 of our Companies Act, the auditors must possess the **requisite qualifications**. This does **not** of course apply to **private companies**. The qualification necessary is a certificate from the Central Government entitling him to act as an auditor of public companies, unless he belongs to some institution or association of accountants whose members have, by a notification in the Official Gazette, been declared exempt from this requirement.

**Directors' interests.**

The section requires full particulars, as to the interests of every director in the promotion and of the property acquired by the company to be stated in the prospectus. This section will cover not only personal interests of the directors individually, but in case any director happens to be one of the partners of the firm, which firm has some interest in such promotion or property, the same has to be disclosed.

**Shares of more than one class & restriction on voting rights.**

Where a company has more than one class of shares the prospectus has to disclose the right of voting at meetings conferred on each class, if any, and our Indian Act further requires now that *in case of Indian companies the rights in respect of capital and dividends attached to the different classes of shares must also be disclosed*. The new Indian Act as applying to Indian companies only, further states that *where the articles of the company impose restriction upon members or shareholders in respect of the right to attend, speak or vote at meetings of the company or the right to transfer shares or if any restrictions are imposed on directors of the company in respect of their powers of management the nature and extent of these restrictions must also be disclosed*. This disclosure is now required because in the case of some companies

the articles lay down that a shareholder who is a new shareholder and has not been on the register for a certain number of months shall not have the right of attending the meeting or of voting at it, ann that fact should be disclosed in the prospectus. The other object sought to be served is that where the articles practically deprive the directors of almost all their rights of management and vest them in managing directors, these facts must be disclosed in the prospectus by giving exactly the articles bodily or in some other clear form. In case also where the directors reserve to themselves their right of declining the transfer of shares that fact must also be disclosed (S. 93 (1), Clauses (o) and (p).,

### **Prospectus issued by an old Company for new shares.**

Where an old established company carrying on business wants to issue a **new series of shares** and publishes a prospectus, it is required to **set out in the prospectus** in addition to all other matters the following : (1) **a report by its auditors** with respect to the profits of the company including its subsidiary companies if any so far as the information is available in each of the **three** financial years immediately preceding the issue of the prospectus. It should also state as to what rates of dividends if any were paid by the company on each class of shares within those three years and disclose the source from which such dividend was paid. In case no dividend has been paid it should also be disclosed as to the cases in which such dividend was not paid. In case no accounts have been made up for any part of a period of three years ending on a date three months prior to the issue of the prospectus, a statement as to that should be made ; (2) In case the proceeds or any part of the issue of shares or debentures advertised in the prospectus are to be applied directly or indirectly in the purchase of any business the prospectus must set out a report made by an Accountant or Accountants duly qualified who should be named in the prospectus, upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus. Of course in case the company has been carrying on business for less than

three years, the statement should relate to the lesser period. The statement required must show clearly the **trading results** and all charges and expenses incidental thereto. All income and profits here having no relation to the trading for the period covered as also items of profit or income of non-recurring nature must be excluded. (S. 93 (1A), (1B) and (1C).)

### ■ Offer for sale to be deemed a prospectus.

In England a practice had grown up with a view to avoid the strict requirements of the law with regard to the disclosures in the prospectus, with the result that the public was deprived of the protection which the legislature intended to grant it. This was commonly known as "**offer for sale**". Under this a syndicate or a number of persons took up a block of shares of a company and then offered them to the public for subscription. Under the law, this offer for sale to the public by these persons did not come under Sec. 93 of the Act and thus before 1929 the legal requirements regarding disclosures in the prospectus could be evaded by the company, instead of issuing the prospectus itself and obtaining subscriptions from the public, by allotting the whole issue to a syndicate or company called and "**Issuing House**", which syndicate then offers the shares for sale to the public by means of a prospectus. It is **now** laid down following the corresponding section of the English Act that *where a company allots or agrees to allot any shares or debentures with a view to all or any of the shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of the prospectus and to liability in respect of statements and omissions from prospectus shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription. If persons accepting the offer in respect of these shares and debentures become subscribers of such shares or*

*debentures, the parties who issued such a prospectus would be liable in respect of misstatements contained in such a document. (S. 98A).*

### **Misrepresentations in the prospectus.**

The law with regard to this point is to be found under Sec. 100 of the Act. According to this section, **every** person who is a **director**, or who has consented to be named as a director, and every person who has authorised the issue of the prospectus, will be bound to **compensate** all persons who, **relying** on the statements in the prospectus which were untrue, and misleading, apply for shares and suffer loss. The statement complained of should be **material**, and should be **of fact**, and not of law, unless it is of law which does not apply to British India; and further, the applicant for shares has to show that he **relied** upon the statement when he made his application. In case it happens that though no one particular statement can be challenged as false or misleading, if the contents of the prospectus are of such a nature, that if a number of statements were to be taken together, they would create a false impression, the prospectus would be nonetheless considered misleading. Of course, the party aggrieved must come for his **remedy within a reasonable time** of his coming to know of the statement. (*Aarons Reefs Ltd. v. Twiss*, 1896, A.C. 273). It should be noted that mere "**puffing**" i.e., exaggerated statements of opinion are "insufficient" to upset the contract, unless so gross as, on the whole, to amount to misrepresentation (*Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421). The **points** which the aggrieved person is required to **establish** are :—

- (1) That the misstatement complained of was made **by the company**, or on its behalf;
- (2) That the said misstatement was **material**;
- (3) That the applicant came for his remedy within a **reasonable time and before winding up commenced**,<sup>e</sup> and

(4) That he **relied** upon the statement while taking up shares ;

(5) That it was misstatement **of fact** and not of law.

It must, however, be noted that if an incorrect statement is made in the prospectus, and the directors honestly believed it to be true, but which afterwards turned out to be untrue, they shall not be responsible for damages in a case for deceit. (*Derry v. Peek*, 1889, 14 App. Cas. 337). On the question as to whether the original allottees alone can sue the directors on the ground of misrepresentation, or fraud in the prospectus, there are conflicting decisions, e.g., the one in *Peek v. Gurney*, 1874, L.R. 6 H.L. 377, that **persons who buy shares on the market**, as distinct from those who apply originally, **cannot sue** relying on the prospectus, because the "office of the prospectus is exhausted" as soon as the shares are allotted. It may be added that a **subscriber to a memorandum of association** cannot escape liability of pleading misrepresentation with respect to the shares he has agreed to take up by his subscription for the simple reason that the company before its existence could not have agents to misrepresent. (*Metal Constituents Ltd.*, 1902, 1 Ch. 707). See, also, *the Indian Case, Bansidhar v. Tata Power Co.*, 27 Bom. L.R. p. 330, where it was also laid down that in expression "directors, their agents and friends" the word "friends" included both business and social friends and was not restricted to those only personally influenced by directors.

Again, as per Romer J., in *Lynde v. Anglo-Indian Hemp Spinning Co.*, 1896, 1 Ch. 178, "to make a company liable for misrepresentation inducing the contract to take shares from it, the shareholder must bring his case within one or other of the following heads :—(1) Where the misrepresentations are made by directors, or other general agents of the company entitled to act, and acting on its behalf, as for example, by a prospectus issued by the authority or sanction of the directors of a company inviting subscription ;  
 \* (2) where the misrepresentations are made by a special agent of the company while acting within the scope of his authority, as for

example, by an agent specially authorised to obtain on behalf of the company subscriptions for shares. This head, of course, includes the case of a person constituted agent by a subsequent adoption of his acts; (3) where the company can be held affected before the contract is complete, with the knowledge that it is induced by misrepresentation—as for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentation even though made without any authority; (4) where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some these representations were material and untrue—as for example, if the directors of a company know when allotting that an application for shares is based on the statements contained in the prospectus, even though that prospectus was issued without the authority or even before the company was formed and even if its contents are not known to the directors."

In *Bansidhar v. Tata Power Co*, 27 Bom. L.R. 330, about which a reference had already been made, the directors stated in the prospectus that a certain number of shares were taken up by "the directors, agents and their friends" and the balance was offered to the public. B who had applied for shares relying on this statement objected on the ground of misrepresentation because the shares were merely "reserved" and the reservees distributed them among their friends and thus the statement was alleged to be untrue. The lower Court held that the word "friends" included both social and business friends but that it cannot mean friends of their business friends and thus the statement was untrue. The Appeal Court did not agree with this and held that the promoters had substantially "reserved" the number given in the prospectus and that though the reservees were arranging for others to pay and take them up it was substantially correct to state that they were reserved for the friends of the directors and agents.

**Omission** of material facts in some cases amounts to misrepresentation. But the omission should be such as would make the



prospectus misleading. (*Aaron's Reefs v. Twiss*, 1896, A.C. p. 273) It has also been held that **concealment** in a prospectus may amount to a fraud if it **implies a falsehood** (*R. v. Kyslant*, (1932) 1 K.B. 442). The damages in this connection will be assessed on the basis of the difference between the actual value of shares on the date of allotment, *i.e.*, the value which the said shares would have fetched if the particulars stated in the prospectus had proved to be accurate, and the amount actually paid in. (*Peek v. Derry*, 1888, 37 Ch. D. 541). The **grounds on which the director**, or any other officer, who is sued for misrepresentation or fraud, **can escape liability** are given in Sec. 100 which are as follows:—

- (a) With respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts, or was true ;
- (b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy or extract from a report or valuation of an expert, that it fairly represented the statement, or as a correct and fair copy of or extract from the report or valuation : Provided that the director, or person named a director, promotor or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and
- (c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document :

or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of prospectus, and that it was issued without his authority or consent ; or
- (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or

- (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reasons therefore.

### **Statement in lieu of Prospectus.**

With regard to **public companies which do not issue the prospectus**, Sec. 89 makes it compulsory for them to file a "statement in lieu of prospectus," which has to be signed by every person who is named in such a statement as a director, or proposed director of the company, or as a duly authorised agent. The allotment of any shares, or debentures, cannot be made without compliance with the requirements of this section. This "statement in lieu of prospectus" practically enumerates all those points which are required to be stated in the prospectus issued to the public. A specimen of this statement is appended to our Companies Act, 2nd Schedule, as given in the Appendix of this book. A person who has applied for shares on the faith of statements contained in the "statement in lieu of prospectus", has the same right of rescission as if they were contained in a prospectus (*Blair Open Hearth*, 1914, 1 Ch. D. 390).

### **Commencement of Business.**

Section 103 of our Act lays down that the company shall not commence any business or exercise any borrowing power unless :—

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the **minimum subscription** ; and
- (b) every **director of the company has paid to the company** on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash ; and
- (c) there has been filed with the Registrar a duly verified **declaration** by the secretary or one of the directors in the prescribed form, that the **foremid conditions** have been complied with ; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the Registrar a statement in lieu of prospectus.

All these requirements being complied with, the Registrar of joint stock companies will grant a **certificate** to the effect that the company is entitled to commence business. If this rule is broken, *i.e.*, if the company were to commence business, or exercise borrowing powers in contravention of the requirement of the Sec. 103, every person responsible for such contravention shall be liable to a fine not exceeding Rs. 500, for every day during which such contravention continues. In case any **contracts** are entered into by the company **before** the date on which it is **entitled to commence business** they are declared to be "**provisional only**" and shall not be binding on the company until such date. There requirements do **not** apply to a **private company** which can commence business immediately on incorporation.

### **Liability of a Member.**

The principle well defined and universally accepted is that in the case of a company or industrial or provident society with limited liability, if the constitution defines or attempts to make a member liable in some event for any larger sum than the amount, if any, unpaid on his share, it is *ultra vires* (*Dibble v. Wilts & Somerset Farmers*, 1923, 1 Ch. D. 342). It has also been held that there is no difference in principle between a case where it is sought to make a member liable to pay more than the nominal amount of any shares of which he might for the time being be the holder and a case where it is sought to compel him to acquire additional shares. *Manners v. St. David's Gold and Mines*, 1904, 2 Ch. 593).

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## CHAPTER VII.

## PRIVATE COMPANIES.

## Their Origin and Definition.

Private companies were first introduced in India by our Companies Act of 1913. In England, before the passing of the Companies Consolidation Act of 1908, the term "private company" indicated those companies which did not offer their shares to the public at the time of incorporation. In other words, any company whose shares were privately subscribed for, came under that designation. This did not work satisfactorily because shares originally issued privately, began to be sold in the market and thus requirements as to the prospectus, etc., could be easily avoided by an original private issue. Thus, the Consolidation Act of 1908 of England divided companies under two distinct headings, *viz.*, "private", and "public". The first, namely, a private company, was strictly restricted to the membership of fifty, as we shall see presently, whereas the second, namely a public company had to be incorporated with a membership of at least seven, though in this case the maximum number was left unlimited. Besides this, publicity is particularly insisted upon in the case of public companies, and the promoters are compelled either to issue a prospectus to the public, or to file a statement in lieu of prospectus. According to the **definition** of our Indian Companies Act of 1913 (Sec. 2 (13)) a "**private company**" means a company which

(i) by its articles

(a) restricts the right to transfer its shares *if any* and

(b) limits the number of its members to fifty *not including persons who are in the employment of the company* (exclusive of persons who are in the employ of the company) to fifty ; and

(c) prohibits any invitation to the public to subscribe for shares *if any* or debenture of the company ; and

(ii) continues to observe such restrictions, limitations and prohibitions.

Provided that, where two or more persons hold one or more shares in a company **jointly**, they shall, for the purpose of this definition, be considered as a single member.

Generally, private companies are family affairs, but legally they are in the same position towards the public as public companies. Even if practically all the shares of the company are held by one member, the company is a distinct being or "person" (*Saloman v. Saloman & Co. Ltd.*, (1897) A.C. 22).

It may be further noted that associations not for profit, companies limited by guarantee, and unlimited companies which have no share capital cannot be incorporated as private companies, as restrictions required to be imposed in connection with transfer of shares cannot be provided for in the articles.

In the English definition of a private company in the above clause (b) instead of the italicized words as given there the following words appear "**(exclusive of persons who are in the employment of the company)**". Thus a slight difference may be noticed in the wording.

### **Exemptions and Privileges.**

It will be seen from the above that there cannot be less than two members, nor more than fifty, exclusive of persons who are in the employ of the company, in case of a private company, and that, such a company should not make a public offer of shares. The **privileges enjoyed by these private companies** comprise of the following exemptions :—

- (1) They need not file a statement in the lieu of prospectus.
- (2) They can commence business and exercise borrowing powers as soon as they are incorporated and need not comply with the other requirements enforced from public companies.
- (3) They are not to forward a statement in the form of balance sheet to the Registrar.
- (4) No reports are required to be filed by them as in the case of public companies.

- (5) Their profit and loss account and balance sheets need not be audited and certified by auditors of requisite qualifications as is the case under the Indian law with public companies. In English law any one irrespective of his qualifications can be an auditor in both public and private company.

In English law it may be also noted that profit and loss account has not to be compulsorily circulated among the members. The new India Act has made that compulsory now both in case of private and public company.

- (6) The requirements as to "minimum subscription" do not apply to them.  
 (7) They are free from the requirements in regard to appointment of directors by the articles, as well as their consent to act as such, and to take up and pay for the qualification shares, if any, as applying to public companies.  
 (8) They are not required by law to file their annual profits and loss account and balance sheets with the registrar, but they are required to disclose the amount of the paid-up capital and their indebtedness secured by mortgages and charges.  
 (9) The section relating to statutory meetings and statutory reports does not apply to private companies.

A private company in other respects has to comply with the requirements of the Companies Act applying to companies in general. These may be summarised as :—

- (1) An annual list and summary must be submitted to the Registrar. (S. 32).
- (2) The Register of Members must be maintained which should be open for inspection to the public. (31—36)
- (3) The Register of Directors and Mortgages and charges must be maintained. (Ss. 87, 109)
- (4) Annual General Meeting must be called. (Sec. 76).
- (5) Its accounts must be audited though not by an auditor of requisite qualification. (S. 144).
- (6) According to the requirement of Sec. 135 it must furnish every member with copies of the profit and loss account or the income and expenditure account, balance sheet and the auditors' report on payment of the specified charge.

To put it briefly a private company with certain exceptions is subject to the requirements of the Companies Act. In the words of Lord Macnaughton in the case of *Trevor v. Whitworth*,

12 App. Cas. 409 "**a family company**, whatever that expression means, does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company. It can have no special privileges or immunity."

On this principle it was laid down in *re. Geo. Newman & Co.*, 1895, 1 Ch. D. 674 that the directors cannot pay themselves or make presents to themselves out of company's assets which are not authorised by the shareholders or by the interests regulating the company. As per Lindly, L. J. "A registered company cannot do anything which all its members think expedient, and which apart from the law relating to incorporated companies, they might not lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as anyone properly sets the company in motion.

### **Their Advantages and Utility.**

The private company arrangement makes it possible for advantages of limited liability being provided for in case of an enterprise where a limited number of partners wish to control the whole establishment and provide for the complete capital. Here, the **privacy** of the business affairs, as well as the **limitation of the liability** is provided for, and the **death or retirement**, of a member does not, as in case of a partnership, put an end to the existence of the company. In short, the advantages of a private partnership are maintained side by side with the addition of the privilege of the limitation of liability. From this, it must not be thought that an unlimited liability company cannot be registered as a private company.

Another advantage afforded by a combination of this character is where the head of a partnership firm, who is holding the bulk of the capital, retires he may convert his partnership firm into a

private limited company, retaining a substantial interest in the fortunes of the enterprise by holding a large capital in the company, and at the same time relieve himself from the anxiety of being liable to his last penny to the creditors of the company in case of a subsequent failure. It also **enables parties to launch into risky enterprises** because, they can limit their stakes as well as participate in the working of the concern. In case of a **family business, the owner may safely retire**, or take it easy, by converting his firm into a private limited company, leaving his sons and trusted old servants to look after it. He knows his actual stake in the enterprise and feels secure as to the balance of his savings. Thus the old business is run on the same old lines, by men of experience and interest, under the fostering care and general supervision of its parent.

Again, a private firm cannot claim a **monopoly with respect to its name** which is here secured through incorporation as a private company. Though the number of members is here limited, there is **no limit as to the amount of capital**. In England, in fact, there are thousands of private companies in existence with capitals ranging from one hundred pounds to one million. It is also open to private companies to raise loans and borrow money through the **medium of debentures**, besides borrowing in the other forms open to trading companies. According to Sir Francis Palmer, under Sec. 105, it will be possible for a private company to pay a commission for subscribing or agreeing to subscribe or for procuring subscription of shares as for this purpose there need not be a public offer.

A further advantage is the facility which generally joint stock companies enjoy in connection with borrowing. Besides borrowing on the same footing as an ordinary firm of a sole owner or a partnership, a company **can issue debenture-bonds**. This form of borrowing has many advantages. Here by issuing debentures in small values a substantial amount can be raised if the company commands a credit. In fact past experiences have proved that people and even traders are too ready to give credits to joint stock



companies and have frequently landed themselves in trouble by losing on careless investments. The facility afforded by debentures to its holders is a great attraction. They can be conveniently sold or transferred and when due can be easily enforced in a Court of Law. They are generally secured by a mortgage of the company's assets and are thus a safe investment particularly when the mortgage is a fixed mortgage. Another advantage is that unlike a partnership where if a partner lends money to his firm he is postponed until all the other creditors of the firm are paid in full, a member of a joint stock company can by purchasing debentures become a creditor of the company with an equal right to share in the assets of the company in liquidation with creditors of the same degree or class. Thus a private firm can secure a larger scope for securing additional capital for its business as a private company by issuing shares with varying rights as to the sharing of profits, voting, etc., or by issuing debentures as we saw above which it cannot do as a private firm. In the case of public companies, the articles generally restrict the borrowing powers of directors but the articles of private companies generally do not, as this check is in the majority of cases not necessary on the powers of directors, who here are proprietors holding almost all the shares.

There are also cases where **a number of firms** carrying on the same type of business have found it advantageous either to **combine into one private company** holding proportionate capital and thus eliminate competition, or to arrive at the same result by converting themselves into so many separate private companies working in a sort of union or combine, pooling and dividing the profits along agreed lines.

In the case of a partnership though the powers of individual partners may be limited by the partnership agreement, an outsider who deals with the firm, unless he is told of the limitations (which in practice is never done) is entitled to take it for granted that every partner has complete powers implied by partnership law and many enter into agreement which may put the firm into a loss. His brother partners are liable to make good this loss, though the

partner responsible for the agreement may have exceeded his contractual powers as a partner, and may not be able to recover this loss from the guilty partner in case he is financially weak. In the case of a private company, however, the directors are tied down by the limitations of their powers in the articles and what is still better is that every **outsider** who deals with the company has the onus thrown on him to make himself acquainted with the contents of the articles before dealing with the company. He **cannot** thus **plead ignorance of the powers of the directors** where such powers are **exceeded** in connection with his agreement with the company.

The **complications** arising in the position at law in cases of death, lunacy, insolvency, retirement, etc., **of partners** in a partnership are all **unknown** to a company combination and that is one more attraction for it to be converted into a private company. The transfer or assignment or mortgage of his share by a partner involves the firm, at the instance of his brother partners, into a dissolution. All these can be done with the shares held by principal partners in the company without involving any serious legal incident.

Under this arrangement a concern can take in as many **investing or financing or sleeping partners** as they like **without** burdening these parties who do not take any managing part in the concern, **with unlimited liability**. This advantage is in itself great in inducing people with capital to invest without hesitation, by purchasing shares and sharing profits without risking the burden of unlimited losses and the consequent liability in case of failure and dissolution. The customers and the employees can also here be made to purchase shares and thereby become interested in the success and prosperity of the concern.

In the private companies the principal members holding the bulk of the capital are generally appointed, by the articles and the agreements, "life directors", or permanent directors, and are also frequently styled managing or governing directors.

In business of a speculative nature, if run under a private limited company organisation, the owners can lay aside the profits, without running the risk of being called upon to disgorge them to make good losses. On the same basis when the owner of a profitable business dies and the sons cannot, for one reason, or other, attend to the business they can, instead of winding it up, convert it into a private limited company and permit the experienced officers of the firm to carry it on without shouldering unlimited risks.

There are cases where a profitable business finds itself in temporary monetary difficulties and forcing the hands of its proprietors is likely to cause losses to the creditors. Here a conversion of the business into a private company is the best solution in the interests of all, and has proved satisfactory, the creditors being either paid debentures or cash as may be arranged. There are occasions when a **syndicate** is formed either **to corner** a commodity or to carry on some other equally **risky enterprise** in which cases the syndicate finds it best to don the garb of a private limited company.

The private company stands on the same footing as a public company as regards the issue of preference, ordinary and founders or deferred shares as well as "reserve capital".

In **India** a good number of managing agency firms have converted themselves into private limited companies for personal safety.

It should be noted that under Sec. 105 of the Indian Companies Act a private company can pay **underwriting commission** in the same way as a public company because the section applies to both types of companies (*Dominion of Canada General Trading and Investment Syndicate v. Brigstocke*, 1911, 2 K.B. 648). Under Indian Companies Rules 1914, Form VIII is prescribed, which has to be used where shares are not offered for public subscription in the case of a public company and also in the case of all private companies and the amount or rate of commission has to be disclosed which has to be signed by all the directors and filed

with the registrar. The statement should be filed before payment is made for safety as the language of the Act on this point is rather ambiguous. The **English Act** has got a similar provision and the form prescribed under the rules of the English Act explains that the object of filing this statement is to remove doubts as to whether a vendor to or promoter of or other person who receives payment in money or shares from a company has, and always has had, power to apply any part of the money or shares so received in payment of any commission, the payment of which if made directly by the company would have been legal under the Companies Act. (See W. N. 1908, 11th July, p. 223).

The obligation to have at least two **directors** in English law, and at least three in Indian law as applying to public companies do not apply to private companies except in case of India *a private company being a subsidiary company of a public company*. (Sec. 83A.) (2). It is, however, usual to have a small number of directors. There are cases where "life" directors may be appointed and such "life" or permanent directors are empowered to appoint other directors to act under or with them. Powers are also given to such a "life" director to remove the directors appointed by him and also to regulate their powers and duties. It is thus possible in case of proprietary concerns nominally registering as limited private companies to maintain complete power in the hands of the principal proprietor.

There are cases, however, where the directors' powers have to be restricted by articles limiting the amount beyond which the directors of a private company cannot borrow without the sanction of the shareholders or without similar sanction they may be restricted from entering into contracts exceeding a certain amount or to sell the undertaking of the company or any part thereof.

### **Annual List and Summary.**

The Annual List and Summary as required by Sec. 32 of the Indian Companies Act, 1913 must be prepared and filed with the registrar in the case of private companies also *within eighteen*

*months from its incorporation and thereafter once at least in every year. Failure to file the list in time, i.e., within twenty-one days after the day of the first or only general meeting of the year entails a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.*

*Under new sub-section (4) of Sec 32 added by the Indian Companies (Amendment) Act of 1936 a private company must send with the annual return a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and whereas the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons not to be included in reckoning the number of fifty. (S. 2 (1)).*

It may be mentioned that the requirement as to the certificates, as given above, were inserted in our Indian Act by the Amending Act of 1936 in order to bring the law on the **same footing as the English law** as in the English Act of 1929.

### **Conversion of private company into public company.**

It is quite open to a private company to convert itself into a public company if it so desires because Sec. 154 provides that—

*Sec. 154—(1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of Sec. 2. are required to be included in the articles of a company in order to constitute it a private company, the company shall, as on the date of the alteration, cease to be a*

private company and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges any exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act, shall apply to the company as if it were not a private company :

*Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.*

NOTE :—The above section has been bodily taken from the **English Act** of 1929 where it is Sec. 27.

If should be noted that a private company loses its status as such if it fails or discontinues to observe the essential conditions of the Acts applying to private companies.

**Application of Table "A".**

Of course the various sections of the Companies Act, except those bearing on the points we have dealt with above, equally apply to private as well as public companies. A private company **cannot adopt Table "A"** as its articles of association and the general practice is to draw out a special set of articles in each case. This is because, (1) the restrictions on the transfer of shares have to be provided for, (2) provision has also to be made with a view to limit the number of its members to fifty, (3) the requirements as to directors, qualification, minimum subscription, etc., are not necessary to be provided for and (4) provisions 34, 35, 36, 36, 37, 38, 39 and 40 of the Table "A" with regard to "share warrant" have to be eliminated.

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## CHAPTER VIII.

## SHARES AND THEIR TRANSFER.

## Who can hold Shares ?

Any person who is *sui juris*, i.e., not subject to any disability can be a member or shareholder of a company. A person of full age and sound mind who has the capacity to enter into contracts can become a shareholder. A married woman also can be a shareholder in connection with her separate property. In the case of an infant, as we shall see latter, he can be a member, but may repudiate the share during his minority and after attaining full age (*Re. Laxon & Co.* No. 2, 1892, 3 Ch. 555.)

A share is defined by *Farwell J.* in *Borland's Trustees v. Steel Brothers*, 1901, 1 Ch. 238, as "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se." A contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract including the right to a sum of money of a more or less amount. Our **Indian Company Act**, Sec. 2 (16) defines a share as follows:—"Share means share in the share capital of the company, and includes stock except where the distinction between stock and share is expressed or implied."

The Companies Act declares a share, or other interest of any member in a company, to be moveable property which is transferable in the manner provided for by the articles of association. It has, however, been held that **share certificates** passing from hand to hand with **blank transfer deeds** do not become negotiable instruments and thus a *bona fide* purchaser who is



possession of them by fraud does not acquire a good title (*Hazarimal v. Baboo Chandra Ghose*, 46 Cal. 331). See also 23 Bom. 2 L.R. 1144, where it has also been laid down that :— 1) Share certificates are “**goods**” under the Sale of goods Act, 1930. (2) If a contract to sell is obtained by fraud or cheating it can be set aside but if the performance of the contract is so obtained it cannot be avoided, Each share, in a company which has a share capital, must be distinguished by its appropriate manner. (S. 58).

The **shares are acquired** by persons who thus become members of a joint stock company in any one or more of the following ways :—

- (1) By **subscription** to the memorandum of association.
- (2) By **appication and allotment**.
- (3) **transfer**.
- (4) By **transmission**.
- (5) By **allowing** their names to be entered in the register of members.
- (6) By **estoppel** i. e. by allowing others to regard them, or holding themselves out, as members of the company.

It should, however, be noted that persons merely agreeing to **place** shares i. e. agreeing to find persons who would take the shares, do not become members (*Sorisen's case* 1873), L.R. Ch. App 507).

### **By subscription to the memorandum.**

Persons who subscribe to the memoradum of association of a company become the **first and original members** of the company and on the company's registration they will be entered as members in its register of members. (S. 3o). It was decided in *Tyddyn Sheffrey State Quarries Co.*, 1869, 20 L. T. 105 that whether a signatory to a memorandum of association is put on the register, or not, he acquires the status of a member and is bound to take up and pay for the shares written opposite his name.

**By application and allotment.**

The **usual method** by which a contract for the purchase of shares in a joint stock company is entered into is by sending in a formal application, which is considered at the meeting of the Board of Directors, and allotment letters are sent out to those applicants who are accepted as members. Applications are generally required to be made on printed forms sent by the company either with the prospectus, or in any other manner, to the persons desiring to make use of them. Usually the applications are made in writing but an oral application is as valid as one in writing. The **applications** are so many **offers** from persons sending them, desiring to take up the shares indicated therein and agreeing in case of allotment to pay for the shares according to the regulations of the company. The **allotment constitutes an acceptance** of this offer (*Motilal v. Thakorlal*, 14 Bom. L.R. 648). The usual law, therefore, as to offer and acceptance under the **Contract Act will apply**. From this it will be noticed that, unless the application form is so drafted as to admit of a smaller number being allotted, the agreement will not be complete. In actual practice there is always a reservation in the application to that effect, by which, the applicant agrees to take up and pay for the shares applied for "or any smaller number that may be allotted." It also follows from this, that after the application is sent up, and before the shares are actually allotted, a shareholder can, if he so desires, withdraw his application. (*Pentelow's Case* 1869, 4 Ch.178; *Wilson's Case*, 1869, 20 L. T. 962). Here, the **revocation**, according to the usual rules of the **Contract Act**, must reach the company **before allotment**. In this connection it has been held further that, this revocation can be oral, and that, "In the absence of evidence to the contrary, the Court will infer that a clerk in the registered office of a company is, during business hours, and while the secretary is absent, so far in charge of the office that he has authority to receive a notice so as to make it a communication to the company." (*Truman's Case* 1894, 3 Ch. 272). Thus an oral revocation communicated through the clerk may be sufficient.

*All monies received from applicants for shares must be deposited and kept in a **scheduled bank** as defined in the Reserve Bank of India Act of 1934. until returned or until the certificate to commence business is obtained. Any default or contravention of this provision entails a fine not exceeding rupees five hundred on every promoter, director or other person knowingly responsible for same.*

The above requirement which is given in italics does not apply to **England** but was added by our Amendment Act of 1936.

We have already seen that a company cannot proceed to allotment unless the **minimum subscription** provided in the prospectus is applied for (s 101) When an **allotment** is made in **contravention** of Sec. 101, This application amount payable must not be less than 5 per cent of the nominal amount of the share it shall be **voidable at the instance of the applicant within one month** after the holding of the statutory meeting of the company and not later *or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later* and shall be so voidable notwithstanding that the company is in course of being wound up. Every director who knowingly contravenes or permits or authorises the contravention of this requirement is liable to compensate the company and the allottee for any losses, damages or costs which the company or the allottee may have sustained or incurred thereby, The proceedings to recover such losses or damages or costs must be commenced before the expiry of two years from the date of allotment, (S. 102) Here **both the English and Indian Law are at par.**

The usual method by which the shares are allotted is the sending out of formal allotment letters signed by the secretary, or managing agents of the company. In this case, the **allotment will be complete** at the moment of time the letter is posted. In

this connection it may be added that, the allotment should be made by the directors in such a way as would result in the best interests of the company. In *Percival v. Wright*, 1902, 2 Ch 425, *Swinfen Eady J.* in the course of his judgment said, "directors must dispose of their company's shares on the best terms obtainable, and must not allot them to themselves, or their friends, at a lower price in order to obtain a personal benefit. They must act *bona fide* for the interests of the company." From this arises the question, whether the directors can allot the shares at par when they are quoted on the market at a premium, To that the answer is that where the directors offer these shares to all the shareholders, and give all of them the benefit of the premium impartially, there can be no objection ; but they should not allot shares quoted at a premium, to themselves. or their friends, at par.

We have seen that the allotment letters are usually sent out by post. In this connection it must be noted that the letters should be **actually posted**, and that, handing them to a postman will not be considered as posted, unless the postman is specifically authorised to take such letters. This point was laid down in *re. London and Northern Bank, ex parte Jones*, 1900, 1 Ch. 220, where according to the head-note "Jones applied for shares in a company, but before the letter of allotment was posted—except by being delivered to a postman in London street to be posted by him—the letter withdrawing his application was delivered at the company's registered office and opened by the secretary. By the rules of the post office, postmen are forbidden to take charge of letters for the post-held, that the withdrawal was received by the company before the allotment letter was posted and that there was no contract by Jones to take the share."

Again it has been laid down in *Motilal Chunilal v. Thakorlal Chtmanlal*, 14 Bom. L.R. 648, that where an application for shares is subject to a **condition precedent**, that condition must be performed to create a liability to take them. Where the application is subject to a **condition subsequent**, the liability arises, although

the condition is never complied with. In this case the defendant was induced by the agent of the company to take up ten shares and when the former expressed his doubt as to whether the business would be profitable he was told, "Don't pay for the shares unless a dividend is paid." There upon the defendant signed the contract and the shares were allotted to him and he was entered in the register as a member. Here in liquidation the defendant was forced to contribute the unpaid call-money as the condition was only a condition subsequent.

In another Bombay case the condition to be fulfilled was **condition "precedent"** (*Ramanbhai v. Ghashiram*, 20 Bom. L. R. 692). Here the applicant applied for 400 shares on condition that he was to be appointed a cashier and the Court held that the applicant had no intention to become a member of the company until he had been appointed a cashier and was therefore not bound to take up and pay for the shares as the condition was not fulfilled.

In *Bansidhar v. Tata Power Co., Ltd.*, 27 Bom. L.R. 330, which we have already considered, the applicants for shares were held to have applied for the shares on a misreading of the prospectus and not on the faith of any representation and therefore they could not escape liability to pay for the shares.

### **Allotment to Married Women.**

There is no objection to a married woman subscribing to a memorandum of association or to be allotted shares in her own right (*Re. Leeds Banking Co.*, 1866, L.R. 3 Eq. 781). When a married woman signs a memorandum she may describe herself after her name as "married woman" or "wife of Mr. X. Y.". These shares, when allotted, will be shown in the register in the name of the married woman herself as her separate property, unless and until the contrary is shown. Of course the **directors may**, in connection with shares to which liabilities are attached, **refuse to**

admit a married woman as a shareholder on the ground that they may not be able to recover from her separate property the money so due when she has no separate property or very little of it provided the articles of association give them the power to reject transfers.

### **Allotment to a Corporation or a Joint Stock Company.**

A corporation may be allotted shares and become a shareholder of another corporation or joint stock company if it is **authorised** to hold shares or purchase them **by its constitution** (*Bath's Case*, 1878, Ch. D. 334; *Re. Barnard's Banking Co., Ex parte Contract Corporation*, 1867, 3 Ch. 105).

### **Allotment to a Foreigner or an Alien.**

There is **no objection** to a foreigner signing the memorandum of association and thus becoming a member of a British company so long as he is a friendly alien and **not an alien enemy**. A foreigner may also take shares in a joint stock company (*Princess of Reuss v. Bos* 1871, L. R. 5 H. L. 176) but no person who is **not** a British subject can acquire a share in a **British ship**.

### **Register of Members.**

The register of members is the **most important of all the statutory books** which a joint stock company must keep and get written up-to-date in the manner required by law. Noncompliance with the requirements entails a fine on the company not exceeding Rs. 50 for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default is liable to a like penalty. The **items** which the **law compulsorily requires to be entered** in this book under Sec. 31 (1) are—

- (i) the names and addresses, and the occupations, if any, of the members, and, in the case of a company having share capital, a statement of the shares held by each

member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) the date at which each person was entered in the register as a member;

(iii) the date at which any person ceased to be a member,

Besides this the new Indian Companies (Amendment) Act, 1936 has now added a section, viz Sec. 31 A which provides that *every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index. There is no objection to the index being in the form of a card index, but such an index must in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found. In case of default the company and every officer of the company knowingly and wilfully guilty of same shall be liable to a fine not exceeding fifty rupees.*

The register may be kept in one or more books. (*Re Alliance Financial Corporation, Blaney's case*, 1866, 3 Bom. H. C. R. 106 O. C.).

### **Colonial or Dominion Register**

A company, having its **registered office in England** but **doing business in a colony**, may keep a Colonial or Dominion Register there of members resident in the Colony "Colony" includes British India and the Commonwealth of Australia.

**The Registrar must be notified** of the situation, change of situation, or closing of the office.

A copy of every entry in the Register is to be sent to the registered office in order to keep a duplicate.

The Register may be **rectified** on applying to the Court in the Colony in which it is kept.

### By Transfer.

A shareholder has the right to transfer his shares or any other interest in the manner provided by the articles. The **shares are moveable property**. (S. 29). This transfer is easily effected by filling in and signing the **transfer form**. This transfer form may be either a special form provided for by the company or the forms obtainable at stationers. The usual practice is to provide for a special form in the articles of association. The transfer form has also to be signed by the transferee.

According to the **usual custom of stock exchanges**, when a share is sold on the market, the transferor fills in and signs a transfer form and hands it over together with the share certificate, to the transferee. The transferee then lodges this transfer, with the share certificate, at the office of the company, and the secretary of the company brings the said application for transfer before the next board meeting of the directors.

It has been held that, unless the directors have the **power to refuse** to register a member specially reserved to them by the articles, this transfer must be registered at the earliest moment of time. As for example, in one case, namely *Sussex Brick Co.*, 1904, 1 Ch. 598, a transferee of shares in a limited company sent in his transfer to the company for registration, but for some reason or other, the said registration was omitted. The company went into voluntary liquidation soon thereafter with a view to re-construct. The transferee, under the impression that he was placed on the register, sent his notice of dissent to the liquidator, but the liquidator refused to acknowledge him as a member on the ground that he was not registered. The Court held that if there had been such a **default, or unnecessary delay in registration** as entitled the applicant to an order for rectification, the applicant was to be treated as if he were registered from the time that such a registration should have been made in the usual course. The corresponding Indian case in point is *In re Indian Specie Bank Ltd.*, 17 Bom.



L.R. 342. This, of course, applies where there is no special power left with the directors to refuse the register of a transfer.

In this connection it is important to note that, for the old Sec. 34 of our Act, has been substituted an elaborate Sec. 34 by the Indian Companies (Amendment) Act of 1936, where it is laid down that *an application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided that where such application is made by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee. If no objection is made by the transferee of this transfer application within two weeks from the date of the receipt of the notice, the company must enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee. If the notice is despatched by pre-paid post to the transferee at the address given in the instrument of transfer, it shall be deemed to have been duly given and shall be made to have been delivered in the ordinary course of post. The company cannot lawfully register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip. However, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by the instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit. If the company refuses to register the transfer of any shares or debentures, the company must within two months from the date on which the instrument of transfer was lodged send to the transferee and the transferor notice of the refusal. If any default in this connec-*

*tion is made, i.e., sending of the notice of refusal of transfer within two months from the date on which it was lodged, it would entail a fine on the the company as well as on every director, manager, secretary or officer of the company who is knowingly a party to the default. In case where a share or debenture is held by any person to whom the right to sell has been by operation of law transmitted, the rule as given in Sec. 34 (3), which requires a duly stamped transfer on proper form shall not apply. Of course the rights of the company to refuse a transfer under the articles remain unimpaired by this section.*

It should be noted that when a transfer is not registered, although it is properly executed and paid for, the transferor is considered to be a trustee for the transferee who must indemnify the transferor against calls.

It will be seen from the above that the main object sought to be achieved by the amended section is to prevent what the Special Law Officer in his report calls "the arbitrary way in which the registration of transfer of shares was delayed." Here the section lays down a limit of two months on the ground that in **England** this period has been considered to be sufficient to enable companies to make up their minds in matters of transfer and in the opinion of the said officer "there is no reason why that should not be deemed sufficient here as well". In addition to this the new section further provides for a notice to be given to the transferee before the transfer is effected in case where the application for transfer is made by the transferor and the shares are partly paid. The object here is obvious, *viz.*, to give the transferee a chance of objecting to a transfer of a partly paid share on his name, particularly because he thereby incurs the liability of having to pay the unpaid balance when calls are made.

Where, however, **discretion** is left to the directors entitling them to refuse a transfer, it has been held that as long as they exercise this discretion wisely and *bona fide* the Court shall not interfere (*Coalport China Co.*, 1895, 2 Ch 404). This, of

course, does not mean that the directors can refuse to allow a transfer to all comers because if they did so they would be abusing their powers. The power to reject transfers is a **trust** to be exercised for the benefit of the company and should be exercised *bona fide* without being **oppressive, capricious, or corrupt**. The directors are **not bound to give reasons** but the Court must be satisfied that they have considered the transfer and have refused under powers given to them. If, however, they give reasons for refusal the Court will consider whether they are legitimate (*In re Bell Bros.*, 65 L.T. 245; *Sree Mahant Kishora Donjee v. Coimbatore Sping. & W. Co.*, 1902, 26 Mad. 79-83; *Muir Mills v. T. H. Condon*, 1900, 22 All. 410). But when this refusal to transfer an application was made because the directors knew that the company was on the point of suspending payment, the refusal was considered to be fair and *bona fide* and the directors were not held to be in default (*Alexander Mitohell's Case*, 1879, 4 App. Cas. 548).

It has been held that a shareholder has a right to transfer to a pauper or "a man of straw", even though it be to avoid liabilities (*De. Pass, Case*, 1859, 4 De G. & J. 544).

A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer (S. 35), but transfers made when the company is being wound up are void, unless the Court or the Liquidator sanctions them.

In this connection it may be noted that the purchaser of the right, title and interest of a shareholder at a Court sale is subject to the same rules as those applying to a private purchaser (*Manilal Brijlal Shah v. The Gorahan Spg. & Mfg. Co.*, 18 Bom. L.R. 982). When shares are transferred near dividend time, the agreement usually states "cum dividend" (with dividend) or "ex dividend" (without dividend). If no such term is specified, the transferee is entitled to all dividends declared by the company after the date of the transfer.

### Blank Transfers.

It is a frequent practice, while raising money on the security of shares, to execute blank transfers with a view that the party who advances money on this security may, in case of default, sell the shares filling in the name of his buyer, and thus make the transfer complete. If this deposit on shares with a blank transfer is made with a view to mortgage them the mortgagee's position will be the same.

With respect to blank transfers a number of cases have arisen in Bombay and Calcutta, which are of great importance. The question which had to be answered was whether a blank transfer was a negotiable instrument so that a *bona fide* buyer of shares on the market from a person who had no authority from the registered owner would get a good title. In *Hazarimall Shohanlal v. Satish Chandra Ghose*, 46 Cal. 331, Chaudhari J., held that (a) a *bona fide* purchaser of shares from a person who is in possession of them by fraud, does not acquire a good title to them and (b) share certificates passing from hand to hand with blank transfer deeds do **not** thereby become **negotiable** instruments.

In Bombay the Appeal Court in *Abdul Vahed Abdul Karim v. Hasanali Alibhai Ghasia*, 28 Bom. L.R. 562, laid down to the effect that the registered owner of shares by handing over share certificates with a blank transfer duly signed by him to another person does not represent to the world that such a person is entitled to deal with the shares and therefore a *bona fide* purchaser from such a person does not acquire a good title to such shares. In this case the **English** cases, viz., *Frann v. Clark*, 26 Ch. D. 257 and *Fox v. Martin*, 1995, 64 L.J. Ch. 49, were followed.

In *M. P. Bharucha v. Wadilal Sarabhai & Co.*, 28 Bom. L.R. 777 the Privy Council decided however that shares of a company are "**goods**" within the meaning of Sec. 76 of the Indian Contract Act, 1872 and that as soon as the shares were sold and share certificates with the blank transfer were handed over to the

buyer, the goods became ascertained goods and the property passed. In case, therefore, shares are sold with a blank transfer and a cheque given by the buyer in payment thereof is subsequently dishonoured, the vendor can only sue to recover either on the dishonoured cheque or on the original price of the sale. He has no lien or claim on the shares themselves. With respect to the rule of the Bombay Stock Exchange that in case the cheque paid against purchase of shares is dishonoured the shares are to be returned to the vendor or resold the following day, their Lordships held that the said rule was not intended to make delivery of the share certificates conditional on payment. The real purpose of the rule according to them was not for the purpose of perfection of contracts, or the passing of property, but for estimating promptly the the damages resulting from the purchaser's failure to pay for the shares bought and accepted.

### **Certified Transfers.**

We have seen above that according to the stock exchange practice, the seller of shares has to hand over his share certificate, together with the transfer duly executed by him, to the buyer against cash. Now in case of companies who do not issue separate share certificates for each share held, this is not possible, and thus, e.g. suppar A holds ten shares in a company for which he possesses only one certificate in which he is declared a holder of the said ten shares: now if he wishes to transfer or sell only four out of them and retain six, he has to go to the company's office and lodge his certificate for ten shares with the secretary and get his transfer "certified." This operation of certifying amounts to a remark being passed by the secretary on the margin of the transfer form to something like the following effect :—

Certificate for ten Rs. 1,000 ordinary shares has been lodged in the office of this company,

*For The Bombay Trading Co., Ltd.*

(Sd.) P. RUSTOMJI,

*Secretary.*

This certified transfer can now be handed over on the Stock Exchange by the seller to the buyer against cash, and as the transfer form is thus certified, the share certificate need not accompany it as in the case of an ordinary transfer. It must have been noticed that the **certification of the transfer** amounts to **nothing more than an acknowledgment** by the secretary of the receipt of the certificate in deposit with him. In one case namely, (*Bishop v. Balkis Land Co.*, 1890, 25 Q.B.D. 512) it was held that even if no certificate is lodged, and the secretary carelessly placed his remark on the transfer, the company will not be responsible. It was also held in the same case, that the certification did **not amount to any representation** that the proposed transferor had a **good title**. Certification, however, has been taken in the words of Lindley L.J., in the Bishop's case referred to above as "incidental to the transaction in the ordinary business way, as a part of the legitimate business of all companies having capital divided into shares which are transferable by deed or other instrument."

In Bombay the practice is that when the shares are bought on the open market the transfer deed is signed by the seller and the buyer. The seller's broker lodges the transfer together with the share certificates at the company's office. Certain formalities are gone into at this office and ultimately a **pucca receipt** is issued in the following form :—

From :—The N. M. Co., Ltd. ; To R Carnac Esq.,  
Bombay, 8th July, 1940.

Received for Transfer the following share certificates  
with transfer deeds duly executed.

No. 1007

" 1588 Total two shares.

(Sd.) H. M. Mama,  
Transfer Clerk,

*N. B.* :—This receipt shall be presented within one week from this date, when share certificates will be returned. The company will not hold itself responsible for the safe custody of the above shares beyond one week from this date.

This *pucca receipt* is given to the buyer's broker who hands it to the buyer and obtains the price.

Bishop's case was followed in Bombay in the case of a similar transaction by *Jenkins C. J. (L. W. G. Rivett Carnac v. The New Mofussil Co., Ltd., 3 Bom. L.R. 846)*. Here the buyer who bought the shares and paid against this *pucca receipt* found out later that the transfer form was forged. The company refused to place him (the buyer) on the register. The buyer pleaded that in view of the *pucca receipt* the company was estopped from denying his rights. The Court held that "**the pucca receipt implies no more than certification**" and therefore "no estoppel such as the plaintiff claims is created." In another case, *viz., (George Whitechurch v. Gavanajh, 1902, 1 A.C. 117)* it was held that, where the **secretary had fraudulently certified the transfer, i.e.,** stated that the certificate was lodged with the company, whereas in fact it was not, the company was not estopped from denying that it was so lodged. This is because it was laid down that in the case of certification, a company does not authorise the secretary to do more than give a receipt for certificates that are actually lodged. It has also been held that no secretary of a company, nor its manager, has any authority to pass transfers (*Chida Mines Ltd. v. Anderson, 1905, 22 T.L.R. 27*).

The registration of the transfer is important because the title of the transferee is not complete until his name is placed on the register of members. Again, in one case where a secretary who had once certified the transfer through negligence returned the share certificate to the transferor, which enabled the latter to fraudulently make a second transfer, the company was not held to be liable (*Longman v. Bath Electric Tramway, 1905, 1 Ch. 646*). The point to be considered is whether the **directors issued** the share certificate believing the forged transfer to be properly signed, and whether, the innocent outsider purchased the share and parted with money relying upon this new certificate. If so, the original shareholder whose signature was forged has a right to be placed on the register,

and the company has in that case to **compensate the innocent third party** for the loss, if any, sustained. The company may, in its turn, get itself **indemnified by the person who brings the forged transfer** and gets himself originally transferred even though the said person did so in good faith (*Sheffield Corporation v. Barclay*, 1905, A. C. 392; *Davis v. Bank of England*, 2 Bing. 393).

It may be added here that shares may be **mortgaged** by actual transfer of the shares to the mortgagee who gets them duly registered, subject to, of course, the agreement that on repayment of capital and interest, the said mortgagee shall re-transfer the said shares to the mortgagor. Here the mortgagee becomes a member during the time that the mortgage continues. The other method is by deposit of the share certificates with the mortgagee together with the blank transfer as we have seen above. In the case of a blank transfer the mortgagee shall notify the company **in lieu of distringas**, with the result that the company gives notice to the mortgagee, in case he is called upon to transfer the said shares, or in case where the company wishes to pay dividends in respect of such shares.

### **Transfer or Allotment to a Minor.**

A contract to take up shares by minors is **voidable** and, therefore, care should be taken not to allot shares to minors. From the minor's standpoint, however, there is no objection to his becoming a member and holding shares either through subscribing to the Memorandum of Association or getting shares transferred to his name. Where a **director knowingly allots** shares to minors he is **liable** to make good any loss that may arise to the company (*In re Crenver & Wheel Abraham United Mining Co.*, 1872, 8 Ch. App. 45).

It may be further noted that in case an infant or a minor has been allotted shares on his application and has paid for them and has received no advantage either pecuniary or otherwise, has not attended any meeting or joined in the management, he can **repudi-**



**ate** the contract **and** **reclaim** the amount paid even in a winding up (*Hamilton v. Vaugham-Sherrin E. E. Co.*, 1894, 3 Ch. D. 589). The company or its liquidator may also get the transfer set aside on learning that the transferee was an infant if they did not know of his infancy. The minor who wishes to repudiate on his coming of age must act **promptly**. If, however, after his majority, he intentionally permits the company to believe him to be a shareholder and in that belief to pay him dividends he is estopped by his conduct from denying that he is a shareholder (*Fazulbhoy Jaffer v. The Credit Bank of India Ltd.*, 1914, 39 Bom. 331).

When an infant or minor repudiates, the person who has transferred the shares to the minor can be restored to the register or the list of contributories, as a member and this in spite of the fact that the transferor was not aware of the minority of his transferee at the time of the transfer. The transferor, however, will be relieved from his liability if the infant does not within a reasonable time of his attaining majority repudiate, or if the company fails to repudiate and thus the infant becomes a duly constituted member.

### **Transfer to a Firm.**

The transfer may be to a firm in its firm name and if accepted the **partners** become **individually liable** for calls. The usual and proper course, however, is to require the names of members to be entered in the register as joint holders.

### **Stamps on Transfer, etc.**

It should be also seen that every transfer is property stamped before it is passed but in case an improperly stamped transfer is passed and the transferee put on the register, a subsequent objection will not affect the transferee's title. If, however, the transfer is made by mistake and a wrong person placed on the register, it may be rectified. The person who transfers his shares remains liable until there is on the register a transferee who is legally liable to the company (*Sorabji Jamsetji v. Ishwardas Jagjiwandas*, 20 Bom. 654). See also Sec. 156. When the transfer is complete and

the transferee entered on the register he becomes liable to pay all money falling due after this event on his shares. When shares are given by way of a gift the gift is complete only after the transfer deed is accepted and registered in the company's books, (*Amarendra Krishna Dutt v. Monimeyary*, 1921, 48 Cal. 986).

### By Transmission.

**When a shareholder dies** his share vests in his executor or administrator, as the case may be, and his estate is liable to pay calls in case a balance remains unpaid. These representatives may either allow the shares to be entered on the register in their own names or allow them to remain on the register in the name of the deceased shareholder.

The **executors or administrators** must prove their title by producing the probate or letters of administration and thereafter the company must deal with them. The directors cannot compel an executor to get his name entered on the register of members. The usual course for the executors to follow is either to accept liability or to transfer the shares in favour of a legatee or a purchaser. Even when the executors have not got the shares transferred to their name they are nevertheless entitled to a dividend (*Bombay and Burma T. C. Ltd. v. F. Y. Smith*, 19 Bom. 1).

In case of **bankrupts** the said shares vest in the **official assignee**, whereas, in the case of **lunatics** they vest in the **committee**, if any, appointed by the Court. The personal representative may, if he likes, transfer his shares, or allow them to remain in his name. In case the shares are kept under their names in the register, they are personally responsible on them, but they are entitled to be **indemnified by the beneficiaries** in case any loss is sustained. Sec. 35 of our Act lays down as follows in that regard:—

**A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member, at the time of the execution of the instrument of transfer.**

It has been held that the executor, though not on the register of members, can give notice of dissent in a case of reconstruction under Sec. 192 of the English Act, the corresponding section of the Indian Act being Sec. 213 (*Llewellyn v. Kasintoe Rubber Estates*, 1914, 2 Ch. 670).

It should be remembered that when the articles require that the new shares must be offered to the members and the company happens to issue new shares, the estate of the deceased member should not be ignored and the executor or the administrator who may be in power or the trustee, must be sent the option of purchase in the same usual form as to the other shareholders (*James v. Buena Ventura Syndicate*, 1896, 1 Ch. 456 ; *New Zealand Gold E. Co. v. Peacock*, 1894, 1 Q. B. 622). Executors though not on the list of members may give notice of dissent in case of reconstruction under Sec. 208C. old Sec. 213 (*Llewellyn v. Kasintoe Rubber Estates*, 1914, 2 Ch 670).

So long as the executors or the administrators allow the shares to remain in the name of the deceased, they shall not be personally liable for calls even though the company may without their consent place their names upon the register (*Buchan's Case*, 1879, 4 A. C. 549). Unless the articles prohibit the representatives from allowing the shares to remain in the name of the deceased, they can allow them to remain so over any length of time. The only inconvenience will be that they are not entitled to have notices sent to them or to the registered address of the deceased unless they themselves become members, by registering their names (*Allen v. Gold Reefs of West Africa*, 1900, 1 Ch. 656). Of course the executors can sell or transfer the shares in their representative character to purchasers or heirs or legatees of the deceased, but the fact that they are executors or administrators or trustees cannot be entered on the register as this is prohibited by Sec. 33 of the Indian Companies Act.

## THE SHARE CERTIFICATE

We have seen that when a shareholder is entered on the

register of members he is given a certificate known as the share certificate which is according to Sec. 29, *prima facie* evidence of the title of the member to shares, or stock, specified therein, if issued under the common seal of the company. The share certificate is virtually speaking the title deed of the member. (*Societe Generale de Paris v. Walker*, 1886, 11 A. C. 20 at p. 44). The certificate "is a declaration that the person in whose name the certificate is made out, and to whom it is given is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares." (*Cockburn C. J. the Bahia v. S. F. Ry. Company*, 1686, 3 Q. B. 584 at p. 595). From this it follows, as we have already seen under the head of transfer, that if an **innocent third party** buys the share in the market **relying on the certificate** issued by the company on a forged transfer, he will be **entitled to compensation**. This is because though the company cannot register the transferee, it cannot deny the truth of the statements made by it in its certificate.

In this connection it may be further noted that, according to Sec. 108, every company is bound to complete and have ready for delivery, the **certificates** of all shares and debentures and debenture stock, allotted or transferred **within three months after** the said **allotment** of such shares, debentures or debenture stock, unless the conditions of the issue of such shares, or debentures, provided otherwise. This section has to be strictly followed, or otherwise, all officers of the company who are knowingly party to such a default, are liable to a fine not exceeding Rs. 50, for every day during which the default continues.

The rule with regard to the certificate being *prima facie* evidence applies in cases of genuine certificates issued by the company and not in those cases where the certificates are forged. In one case where the secretary forged the signature of the directors of the company and fraudulently affixed the seal of the company it was held that the company was entitled to deny the certificate

(*Ruben v. Great Fingall Consolidated Co.*, 1906, App. Cas. 439).

We have also seen that each share, in a company having a share capital, should be distinguished by its appropriate number (S. 28). Where a share certificate is deposited without being accompanied by a transfer form the inference is that such a deposit is made against any advance of money, is so made by way of an equitable mortgage of shares. The certificate, besides giving the number and the name of the shareholder, states the nominal value of the shares and the amount actually paid up. It may be further noted that the certificate only shows the legal title to the shares and a person who buys and gets the shares transferred in his name may still be defeated by a previous equitable title such as a mortgage. A simple deposit of the certificate as a security for a debt without a transfer or memorandum will also constitute an equitable mortgage of the shares (*Harold v. Plenty*, 1901, 2 Ch. 314). For this purpose a **scrip certificate** is not a share certificate but is on the same footing as a letter of allotment.

### Share Warrants.

A limited company may, if so authorised by its **articles**, with respect to any of its **fully paid shares or stock** issue under its common seal a warrant, stating that the bearer is entitled to the stock, or shares specified therein and may provide for the payment of future dividends on the said shares, or stock, included in the warrants either by coupons or otherwise. These share warrants are **transferable by delivery** to the buyer thereof (Ss. 43 & 44.). These warrants will pass from hand to hand on delivery, and the purchaser need not make any enquiry as to the title of the person who sells the said shares and who may be handing over the said warrants. If a holder of a share warrant wishes to get it **altered into a share certificate** he may, if the articles of the company permit, surrender the warrant for cancellation, and on that step being taken, the holder's name may be entered as a member in the **register** of members (S. 45). The holder of a share warrant has the status of a member if the articles of the company so provide.

But the holding of share warrants for the requisite number of shares will **not be allowed** to be taken as a qualification for acting as a director if the articles of the company lay down a certain number of shares as the requisite qualification (S. 46). When a share warrant is issued to a member on his request, the company must strike out of its register of members the name of the member, and instead enter on the register the fact of the issue of the warrant, placing a statement as to the number of shares, or stock included in the warrant, distinguishing each share by its number and adding the date of such an issue (S. 47).

It has been held that if a company has articles authorising it to issue a share warrant instead of shares which are not fully paid, such articles shall be illegal but this shall not vitiate the registration of the company (*Reuss (Princes of) v. Bos*, 1871, L. R. 5 H. L. 176). In India the issue of share warrants is **not popular**, neither is it in England for the simple reason that the stamp duty is very heavy. In India it is one and a half times the duty payable on a conveyance for a consideration equivalent to the nominal amount of the shares specified in the warrant. It is also an offence under the Indian Stamp Act, 1899, to issue a share warrant not duly stamped (Article 59, Schedule I, Sec. 62 (2) Indian Stamp Act, 1899).

A **private company** is **not permitted to issue a share warrant** (S. 43 (2)). According to mercantile custom share warrants to bearer are **negotiable** instruments (*Webb Hale & Co. v. Alexandria Water Co.*, 1905, 21 T. L. R. 572).

The bearer of a stock or share warrant must produce such warrant before he can exercise any of the rights of a member in respect of the said stock or shares (*Wedgwood Coal & Iron Co.*, 1877, 6 Ch. D. 627). Frequently articles of association provide that the holders of share warrants who wish to attend a meeting or exercise their voting power, if any, must deposit the share warrants with the secretary of the company a certain number of days prior to the date of the holding of such meeting. It has also

been held that where there is a contract to sell shares, *i.e.* registered shares, the delivery of share warrants will not do (*Iredell v. The General Secretaries Corporation*, 1916, 33 T. L. R. 67).

## BONUS SHARES

Frequently "bonus shares" are issued by a company either fully or partly paid **out of its reserve fund** accumulated from profits. The idea here is to capitalise this reserve instead of paying it out in cash. It is argued by economists that it is wiser to issue bonus shares to permit large reserve funds to be exhibited on the balance sheet, because this accumulation may call for reduction of the products of the company concerned on the ground that they were making abnormal profits. The accountants argue that even if that were not so, the issue of bonus shares is the logical adjustment made in account, because the reserve fund is usually used and invested in the company itself and the assets and properties as exhibited on the balance sheet are proportionately representing the reserve fund on the liability side inasmuch as they were purchased out of the accumulation in the reserve fund. Where there are preference shareholders who are only entitled to a certain percentage of profits the surplus is divisible among the ordinary or the deferred shareholders. Thus bonus shares are naturally issued to the latter class which is entitled to the balance of profits. The **legal effect** of the issue of bonus shares is the payment of **dividend in the form of shares** instead of in cash. A good many companies provide for the issue of bonus shares in their articles in which case the procedure laid down there should be followed.

The **usual procedure** is to close the register of members for a certain period with a view to ascertain the names of those who are entitled to bonus shares. These bonus shares should be issued either at par or at premium, but of course the universal practice is to issue them at par. There are some rare cases where the shareholders are given the option of either taking shares or cash. When the resolution is passed for the purpose of issuing the bonus share

the usual practice is to appoint either a shareholder or a director or somebody else to act as the agent of the shareholder for the purpose of entering into a contract with the company. If the contract is not desired to be made, the company can allot the shares according to the requirements of Sec. 104 (2) where it is laid down that when such a contract to allot shares for a consideration otherwise than cash is not reduced in writing the company shall within one month after the allotment file with the registrar the prescribed particulars of the oral contract with the same stamp duty as would have been necessary if the contract were reduced to writing and these particulars shall be deemed to be an instrument within the meaning of the Stamp Act of 1899 and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjusted under Sec. 31 of the Indian Stamp Act of 1899.

### **Call on Shares.**

The usual practice in case of joint stock companies whose capital is divided into shares is that a certain amount, not less than 5% of the face value of the shares in case of a public offer, is payable **on application** and a certain amount is payable on allotment. The balance is generally recovered through the medium of calls made by the directors from time to time, as and when they require money for the purpose of the company. It is no doubt usually the practice to state clearly in the prospectus the amount of call which is to be made at one time, and sometimes a period is also laid down, which is to intervene before a call, subsequent to the one made, can be made. The memorandum or the articles also frequently lay down this fact. In the absence of these provisions a shareholder may be called upon by the directors at their pleasure to pay the call. A call, however, cannot be made until the **minimum subscription** has been subscribed. The call, in the absence of an agreement to the contrary, may be of any amount, and if there is no provision of the type we have referred to above, there is nothing to prevent the directors from calling up the whole amount in one call. If, however, the articles or memorandum specify a method by



which the call has to be made, then that method must be strictly followed, as otherwise, a call might be declared to be invalid (*Pioneer Alkali Works Ltd. v Amiruddin Salebhoy Tyabje*, 23 Bom L. R. 411).

When a call is made the resolution making the call must also **fix the date of payment**. Otherwise the call will not be valid (*Cawley & Co.*, 1889, 42 Ch. D. 209). In *Pioneer Alkali Works Ltd v. Ammiruddin Salebhoy Tyabji*, 38 Bom. L. R. it was held that when articles of association empower the directors to make calls and appoint the amount, time, place and person to whom they are to be paid, the said call, can only be made by a resolution stating the amount, time, place and person and in case of failure to do so the defect cannot be remedied by a notice. It has also been held that if the articles and the memorandum do not provide for the method of making calls the directors cannot make a call on some members of one particular class and leave off other members of the same class. The **power of directors** to make calls is **in the nature of a trust** which should be exercised for the general benefit of the company. From this it follows that in case the directors make calls for their own advantage they may be prevented by an injunction (*Gilbert's Case*, 1870, 5 Ch. 599), and this injunction may be applied for with a view to prevent the directors from enforcing the call by forfeiture pending trial of the question. The Court usually grants this injunction on terms that the amount of the call may be paid into Court (*Lamb v. Sambar Rubber Co.*, 1908, 1 Ch. 845), though of course as far as possible the Court is reluctant to interfere in this matter where a good amount of discretion is allowed to the directors (*Odessa Tramways Co.*, v. *Mandel*, 1878, 8 Ch. C. 235).

It was laid down in *Alexander v. Automatic Telephone Co.*, 1900, 2 Ch. 56 to the effect that, the subscribers of the articles of a company limited by shares, are not in the absence of provision in the articles, or any other agreement to the contrary, to pay any calls which are not made in accordance with the articles, or the

agreement concerned. It was also held here that, where the directors by the said agreement with some of the shareholders issue shares, and make it incumbent upon these applicants for shares to make payment on application and allotment, whereas, on their own shares for which they have subscribed in the memorandum they do not require payment, and further, where this fact was not disclosed to other shareholders, the directors were held to be guilty of a breach of duty, and were made to pay up the amount on their own shares on the same basis. In other words, they were not allowed to benefit themselves at the expense of their shareholders. In *Sykes Case*, 1872 13 Eq. 255, the directors, in the case of a company which was short of money, paid in their unpaid amount on the shares they held and out of the money so collected paid themselves out for fees due to them. Here it was held that the transaction in effect was not a *bona fide* payment, as it was effected mainly with a view to serve their own private ends and interests. In the course of the judgment Sir James Bacon; V. C. said: "I think this transaction cannot be reconciled with those principles which are no doubt universal. In my opinion this was a contrivance by which the directors seemed to pay, but did not in fact pay, the amount of their shares uncalled for, and therefore the transaction cannot be allowed to stand."

As a rule calls must be paid for in **cash**; but a shareholder who has rendered some **services** and has a claim for that to be paid by the company will have the right of **set-off**. (*Lorocque v. Beauchemin*, 1897, A. C. 358). In this case Lord MacNaghton in the course of his judgment referred to the decision in *Spargo's Case*, L.R. 8 Ch. 407, where James L. J., made the following observations which, according to his Lordship, were not inapplicable to the facts of the present case, *viz* "if a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of the property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls they might legitimately have been handed back in payment for

the property, it did appear to me in *Fothergill's Case*, L. R. 8 Ch. 270, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again ; but that if the two demands are set off against each other, the shares have been paid for in cash."

When a **shareholder** becomes **insolvent** the company is entitled to prove for calls actually made as well as for the estimated amount of future calls. The **calls in arrear** may be subject to payment of interest if the articles so provide. Table "A" does provide to that effect under clause 14, where it lays down that in case a call is not paid on or before the date on which it is made payable, interest upon the sum due shall be chargeable at 5 per cent per annum from the date appointed for the payment thereof to the actual time of payment. Of course, special articles of a company may provide otherwise, and if necessary, provide for a higher rate of interest.

### **Calls in Advance.**

The company can by its **articles** provide for a payment in advance of the calls not yet made and may also arrange to pay interest on such a sum. Such **interest** may be paid even when there are no profits. In the case in which this point was decided a call received in advance from the shareholder was **treated as** if it was a **loan made to the company** and the member who advanced this became the creditor of the company. Lord Herschell in the course of his judgment expressed himself as follows:—

"It is a fallacy to speak of this payment of interest as being a payment made to a member in his character of member. As member he has no right to have that interest paid to him; he could not claim it. As member he was under no obligation to make the payments in consideration of which the company undertook to pay interest. When, therefore, the company, although they received the money from a member, received it from

him without any obligation upon him as a member to pay it, and undertook to make a payment to him in consideration of it which they were not under any obligation to make to him as a member, it seems to me that it is manifestly erroneous to describe this as a payment made to a member in his character of member." (*Lock v. Queensland Investment Co.*, 1896. A. C. 461). **Table "A"**, clause 17, provides for the payment of interest on calls paid in advance at the rate of 6 per cent. There is, however, **no advantage** gained by paying such calls in advance as far as a shareholder is concerned, except that he may get a certain rate of interest, because in case the company goes into liquidation, the amount so paid in advance shall not be returnable except after the payment in full of the ordinary creditors because they rank in priority only to called up capital (*Wakefield Rolling Stock Co.*, 1892, 3 Ch. 165; *Exchange Drapery Co.*, 1888, 38 Ch. D. 171). These calls once paid in are **not re-payable as long as the company is a going concern** and before it goes into liquidation (*London and Northern Steamship Co. v. Farmer*, 1914, W. N. 200). In case where the shares are transferred, and a call which is made before transfer, but which is payable after the transfer remains unpaid, the **transferor remains liable** to pay the call to the company, but he is entitled to be indemnified by the transferee for this amount (*National Bank of Wales*, 1897, 1 Ch. 288).

When the **trustees** get themselves registered as shareholders they are personally liable to the company for calls and not the *cestui qui trust* (*In re Liquidator of Bomington S. R. Co. v. Somervail*, 1879, 4 A. C. 118). But the trustee is entitled to be indemnified by the beneficial owner againsts these calls. (*Hardson v. Belilios*, 1901, A. C. 648). A transferee of shares by way of mortgage is liable as a contributory as he stands in the same position as a trustee. In winding up, however, Sec. 156 creates a new liability for shareholders in respect of unpaid calls which **can be recovered though barred by limitation**. This applies to all kinds of winding up (*Sorabji Jamsetji v. Ishwardas*, 20 Bom. 654. See also 31 Mad. 66 and 27 Bom. L. R 574 at p. 579). A con-

tract for the payment of calls by instalments is determined on winding up and the liquidator can call the whole amount unpaid.

### Enforcement of Calls.

The directors are in duty bound to enforce payment of calls by all means within their power and in this connection they have the right to **forfeit** shares or to **sell** them in exercise of the company's **lien** or to **file a suit**.

The period during which a call may be enforced, under the Indian **Limitation** Act of 1908, Art. 112, is 3 years from the date on which the call is payable, if made by the company itself or its directors as a going concern. An application by the Official Liquidator for calls is not subject to any limitation. (*Per Farren J., in Chambers, in Re Cattiwar Trading Company*, reported in *Times of India* of 2nd May, 1887).

But if a suit is brought by the liquidator to recover calls in the name of the company and on its behalf, it falls under Art. 120 which gives it a period of six years from the time the right to sue accrues. (*Parel Spinning and Weaving Co., Ltd. (In liquidation) v. Maneck Haji*, 1886, 10 Bom. 483). This decision has been expressed to be open to some doubt by learned text writers as in their opinion such a suit is virtually a suit by the company within the meaning of Art. 112.

It is now enacted by the new Sec. 159 (1) of the Amendment Act of 1936 that *the liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator*.

In **English Law** a call creates a speciality debt which is statute barred after 20 years.

### Forfeiture of Shares.

We have seen that the directors are empowered to make calls and are under a duty to recover the amount of such calls. Forfeiture

ture affords an excellent method of enforcing such payment, but this power must be given by the Articles, In Table "A", clause 24 lays down to the effect that, in case a member fails to pay any call, or an instalment on a call, on the date appointed for payment, the directors may serve such a member with a notice requiring payment of such call, or instalment, and give him at least 14 days' notice within which to pay up the call in arrear, pointing out to him that in case of failure to pay, the shares in respect of such calls made will be forfeited. If a defaulting member does not pay up in spite of this notice, clause 26 of Table "A" empowers the directors to forfeit the shares. This power, of course, will apply to companies who have adopted Table "A" as their articles fully, or partly, otherwise the special articles must reserve these powers.

Where shares are allowed to be forfeited, they may be **resold**, or **re-issued**, at a value equivalent to the amount actually called up on such shares. In reselling, the actual amount which was paid by the shareholders on such forfeited shares may be allowed as a deduction, but nothing more. This deduction will not be treated as an issue at a discount. It will thus be seen that though the right to forfeit shares is not inherent in a company, powers to forfeit may be introduced in the articles by a special resolution or from the very inception (*Dawkins v. Antrobus*, 1881, 17 Ch. D. 615).

When a forfeiture is thus enforced, the directors should see that all the requirements of the articles are **strictly** complied with. Care should be taken in claiming the amount of call and interest in the forfeiture notice, not to ask for anything more than what is actually due, as otherwise the forfeiture and the notice may be held to be bad. In one case, where in the forfeiture notice, interest was claimed from the date of the call instead of claiming it from the date on which the call was payable, the forfeiture was declared to be bad (*Johnson v. Lyttles Iron Agency*, 1877, 5 Ch. D. 687). When forfeiture is resolved upon, the directors should see that the proper quorum is present. A slight irregularity will make the

forfeiture void and **improper forfeiture** may lead to an action for damages (*New Chile Gold Mining Co.*, 2, 1890, 45 Ch. D. 598). Once the shares are forfeited, the shareholder is exonerated from liability as to future calls. But he still remains **liable for the calls made before the forfeiture** was enforced and which were not paid, if the articles of association of that company so provide.

When shares are forfeited in accordance with powers reserved in the articles, after due notice and a proper resolution, the amount falls **due** as from the date of the forfeiture **resolution**, because such an article constitutes a special contract between the shareholder and the company, whereby the shareholder agrees that in the event of shares being forfeited he would be liable to pay to the company all the moneys that due to him for allotment or calls, with interest. The limitation therefore begins to run from the date of actual forfeiture (*Habib Rowji v. Standard Aluminium and Brass Works*, 27 Bom. L. R. 574).

The power to forfeit **cannot be exercised collusively** for the purpose of assisting a shareholder to get rid of the shares and retire from the company in fraud of other shareholders. *In re Agriculturist C. In. Co.*, 1866, 1 Ch. App. 161 where the directors by arrangement with a shareholder wrongfully declared his shares forfeited on the excuse of the non-payment of a call, and the company went into liquidation twelve years thereafter, the whole arrangement was declared void and the shareholder was ordered to be replaced on the list of contributories.

*In Re Agency Land and Finance Co.*, 1903, 20 L. T. R. 41 where the company had by a deed given a charge on the uncalled capital of the company to the debenture holders, it was decided that in spite of this charge, the directors can forfeit the shares in accordance with the powers reserved to them in the articles of association. In some articles powers are reserved to directors to annul a forfeiture upon such terms as they think fit and

that notwithstanding forfeiture the shareholder can be reinstated and forced to pay future calls. This power cannot be exercised without the shareholder agreeing and unless that is done it is inoperative (*In re Exchange Trust Ltd.*, 1903, 1 Ch. 711).

When the company is **in liquidation** the right of forfeiture may be enforced by the liquidator through the help of directors (*Fairburn Engineering Co.*, 1893, 3 Ch. 450). If forfeiture is declared **within one year** of winding up, the former holder is liable as a **"B" list contributory**. If it is declared **more than one year** before winding up, he may be liable **as a debtor**, if regulations allow, for calls made prior to forfeiture.

It has been further held that when forfeited shares are sold, the purchaser of the shares cannot vote until all calls are paid (*Randt Gold Mining Co. v. Wainwright*, 1901, 1 Ch. 184). It has also been held that the right of forfeiture if vested in directors should be exercised for the **benefit of the company** and in good faith because it is in the nature of a trust, and that if not so *bona fide* exercised, the forfeiture may be set aside (*Re Esparto Trading Co.*, 1879, 12 Ch. D. 191). If there is a clause in the company's articles to the effect that, in case a shareholder were to take any proceedings against the company the shares will be forfeited, such a clause will be void and inoperative (*Peeveril Gold Mines Ltd.*, 1898, 1 Ch. 122). It may be further added that when the directors have exercised the right *bona fide*, equity will not give any relief against it (*Sparks v. Liverpool Waterworks Co.*, 1807, 13 Ves. 428).

When shares are forfeited and the shareholder is **insolvent** notice of forfeiture should be given both to him and to the official assignee. When the shareholder is dead this notice has to be sent to his registered address. A liquidator cannot cancel a forfeiture of shares duly made by directors before the commencement of the winding up. When forfeited shares are sold the purchaser is liable to pay the calls in arrear as the company cannot sell them free of this liability; but he is entitled to be given credit for the amount



if any that may be recovered from the defaulting prior shareholder at a later date (*Randt Gold Mining Co.*, 1904, 2 Ch. 468).

### **Surrender of Shares.**

Besides the right to forfeit there is what is called the power to surrender shares. This power to surrender should also have been expressly given in the **articles** otherwise it will be invalid if exercised. This right to surrender is frequently described as a **short-cut to forfeiture**. In *Trevor v. Whitworth*, 1887, 12 App. Cas. 409, it was held that this was a power which can be rarely exercised without the consent of the Court, unless the company has a right to forfeit shares and such right has already accrued. Thus a surrender of shares not fully paid up is valid where forfeiture would be justified. It was further held in the same case, that a surrender in consideration of the payment of money, or money's worth, by the company was a purchase by it of its own shares and was therefore *ultra vires* and it was also held to be equivalent to a purchase by the company.

### **Power to expropriate a Shareholder.**

Arising from this, two later decisions on this point may be noted. Though these decisions mainly turn on the question of the company's power to alter its articles with a view to give power to expropriate a certain shareholder or shareholders in the interest of the company, the principle involved, and the rule of law laid down, are also interesting and may be considered side by side with the company's power to accept a surrender of shares. In *Sidebottom v. Kershaw, Leese & Company, Ltd.*, 1920, 1 Ch. D. 154, a company altered its articles of association by a special resolution, and took powers by which its directors could call upon any shareholder who competed with the business of the company, to transfer his shares to the nominees of the shareholder, at the full value. It was here contended that such a power was invalid, but the Court held that as long as the alteration was *bona fide*

for the benefit of the company, a joint stock company was empowered by Sec. 13 of English Companies Act, 1908, to do so, (Sec. 20 being the corresponding section of the Indian Act of 1913). Thus according to this decision, the directors can **compel a shareholder to transfer** his share to a nominee, provided they acted *bona fide in the interest of the company*. On the same principle it was held in *Dafen Tinplate Co. v. Llanelly Steel Co.* 1920, 2 Ch. D. 124, where the articles of association were altered giving powers to the majority of shareholders to acquire compulsorily shares of any members, and offer them for sale through directors to members, or outsiders, as they think fit, at a fair value to be fixed from time to time by the directors, it was held that such a resolution which conferred an **unlimited and unrestricted power on the majority** to expropriate any shareholder at their pleasure is not in the interests of the company as a whole, and therefore **cannot be allowed**.

### **Lien on Shares.**

A **lien** is a **right** by which a person in possession of property belonging to another, may **detain** that property in certain cases, until certain demands of the person in possession are **satisfied**.

A company may exercise a right of lien on its shares if so authorised by its **articles** of association. It is a usual practice to reserve such powers in the articles. By virtue of this right the company is able to obtain a **charge on the shares** of any of its members **for any debt due by such member** to the company. When a lien is given on shares it usually extends to dividends also. Where the articles reserve such powers they also empower the company to **enforce its lien by a sale**. In such a case the purchaser of the shares will be placed on the register and the member whose shares have been sold, removed with respect to the said shares. It must, however, be noted that where a company has power both to forfeit shares, and to enforce a lien, it cannot enforce its lien by a forfeiture. If

the company wishes to exercise the power of forfeiture in respect of any debt in arrear, it should expressly reserve the power to forfeit shares for non-payment of any debt due to the company (*Dunlop v. Dunlop*, 1812, 21 Ch. D. 583). In the case of a purchaser from the company, who had bought the shares on which calls were in arrear, and on which the company had exercised a lien, it was held that he was not liable on calls in arrear, but was liable to have a fresh call made on him for the like amount (*Balkis New Eersteling v. Randt Gold Mining Co.*, 1904, A. C. 165). In *Bradford Bank Co. v. Briggs*, 1886, 12 A. C. 29, where according to the articles, the company was to have a **first and paramount lien** over the shares for non-payment of calls, etc., and where a shareholder had mortgaged his shares against a loan by deposit at the bank and the bank had given due notice of such deposit to the company whose shares they were, and the shareholder in course of trading with the company thereafter became indebted to the company, it was held that the company having notice of the deposit cannot claim to enforce the lien given by the articles for a **debt incurred subsequent to the notice**. It was held here that the bank which had given notice of this mortgage was not giving a notice of trust (S. 33), but only sought to affect the company in their capacity of traders with notice of the interest of the bank (See also *MacKerth v. Wagon Coal and Iron Co.*, 1916, 2 Ch. 293).

A lien on shares can be enforced **even on trustees** as the shares are on the register in their names and no notice of trust can be placed on the register and the logical sequence is that the lien cannot therefore be claimed on such shares on personal names of the trustees in respect of the debts due by the *cestui qui trust* who is in reality the beneficial owner.

A purchaser of shares which are subject to a lien is bound by it. The exercise of a lien makes the **company a secured creditor in bankruptcy**. (*In re Collie, ex parte Manchester and County Bank*, 1876, 3 Ch. D. 481).

*In re. W. Kay & Son Ltd.*, 1902, 1 Ch. 467, it was further decided that a **company** has **no right to enter** a note or memorandum either on its **register** or on the share certificate, as to its **lien** or claim on the said shares.

The lien is generally enforced by a sale of the shares and articles which specially provide for a lien, also give power to the company to enforce it on default by sale. In the absence of such power in the articles it may be necessary to apply to the Court.

Where a **mortgagee** of the shares **gives notice** of the mortgage to the company, and the mortgagor subsequently incurs liability to the company, the mortgage has priority over the company's lien (*Bradford Banking Co. v. Briggs, Son & Co.* (1886), 12 App. Cas. 29). But if the **mortgagee takes with notice** of the lien he may be postponed to the lien if the Articles so provide.

### **Cessation of Membership**

At this stage the following summary of the different circumstances under which a person ceases to be a shareholder, will be found useful :—

- (1) By **transfer**, subject to liability to be placed on the "B" list if the company is wound up within one year.
- (2) By **forfeiture**, if permitted by the Articles.
- (3) By **sale** of the shares by the company under its lien.
- (4) By **death**, but the estate is liable until another person's name is substituted in the register.
- (5) By a valid **surrender**, i. e. it must amount to a forfeiture by consent.
- (6) By the trustee in bankruptcy disclaiming shares of an insolvent member.

(7) By **rescission** of the contract to take shares on account of—

- (a) fraud,
- (b) misrepresentation, or
- (c) mistake.

This does not apply to subscribers of the memorandum.

(8) By **winding up**.

### **Classes of Capital and Shares**

The capital of a joint stock company may be described under the following headings or terms:—

- (1) **Nominal Capital**, also called **Registered** or **Authorised Capital**,
- (2) **Issued** or **Subscribed Capital**,
- (3) **Paid-up Capital**,
- (4) **Called-up Capital**,
- (5) **Capital Assets**, *i.e.* the actual property of the Company,
- (6) **Working Capital**, *i.e.* the excess of liquid assets over current liabilities,
- (7) **Circulating Capital**, *i.e.* property which is acquired or produced for resale or sale at a profit, e. g. stock-in-trade,
- (8) **Fixed Capital**, *i.e.* property intended to be retained and employed with a view to profit, e. g. buildings, machinery or
- (9) **Reserve Capital**, *i.e.* that part of the uncalled Capital which, the Company has decided by special resolution, shall not be called up except on winding up.
- (10) **Debenture Capital**, *i.e.* the amount borrowed by the Company and secured by its debentures. Strictly speaking borrowed money is not "capital,"

(1) **Nominal or Registered Capital**, is the full amount of capital with which the company is registered, and which it proposes shall be the **highest limit** of its capital to be subscribed. The whole of the nominal capital may be subscribed and sometimes paid up, or only a portion of its nominal capital may be applied for and allotted.

(2) **Issued or Subscribed Capital**, is the amount of capital which has been applied for, and allotted, and which the members who have applied for it are bound to take up and pay. This also includes the capital issued to the vendors as fully or partly paid, and also, that issued fully paid to the founders as remuneration for their services.

(3) **Paid-up Capital**, is that capital which is actually paid for, either in cash, or in some other consideration. It differs from Subscribed Capital in so far as the capital subscribed may not have been called up in full, and the said Called-up Capital may not have been fully paid up by its members, as we shall see in the illustration following.

(4) **Called-up Capital**, is that part of capital for which actual calls have been made by the directors.

To **illustrate** the above, suppose a company to be registered with a capital of Rs. 1,00,000. The Nominal Capital of the company is thus Rs. 1,00,000. Now, if the total amount of applications received for shares are, say, 80 each for one share of Rs. 1,000. and supposing that the whole amount applied for is allotted, the Subscribed Capital of the company would amount to Rs. 80,000. Now, if the application money to be paid is Rs. 100 per share, and the allotment money another Rs. 100, and the balance of Rs. 800, is to be paid in calls of Rs. 200 each, as and when the directors may choose to make them, and if the directors have made one call of Rs. 200, the Called-up Capital in this instance at the rate of Rs. 400 per each share, on 80 shares, would amount to Rs. 32,000. If, out of the Called-up Capital 10 shareholders have not paid their first call of Rs. 200 each, whereas, the rest have

paid their application, allotment and call-money, the Paid-up Capital of the company would amount to Rs. 30,000. The balance of Rs. 2,000, would appear on the balance sheet under the heading of "calls in arrear,"

A **share** or other interest of any member in a company shall be **moveable property** (Sec. 28), and the expression "goods" under the Sale of Goods Act of 1930 includes all moveable property (46 Cal. 331 at p. 337).

With regard to the right of shareholders, and the amount into which the shares are divided, it may be noted that it is not necessary that all shares should be of the same amount, or carry the same rights and privileges. In fact, in actual practice, the capital is divided into shares of different denominations known according to the rights and privileges attached to each. Thus there may be, (1) **preference** shares, and these preference shares may be either **cumulative**, or **non-cumulative**, or (2) there may be what are known as **ordinary** shares, and in addition to ordinary shares, there may be (3) **deferred or founders'** shares. The special rights and privileges, which each of these classes of shares carries, are stated either in the memorandum or in the articles of the company. If the rights are given by the **articles**, they may, of course, be altered in the same manner as the articles of association can be altered. But if they are granted by the **memorandum** of association, they can only be altered if the memorandum reserves such a power (*Ashbury v. Watson*, 30 Ch. D. 376).

It may be mentioned further that even where a company does not in the first instance intend to issue shares with preference, or deferred rights, it should conveniently take such a power in the memorandum. Though a company can at any future date take such a power, it is better that the intention to issue these types of shares be disclosed to the original shareholders from the very beginning. Besides, the alteration of the memorandum and the taking of such powers with the consent of the Court, would naturally involve expence and inconvenience, and may be found to be sometimes a

course most difficult to take, as the Court may refuse its sanction where it finds that the new arrangement is not fair and desirable.

### Preference Shares.

These are shares, the dividends on which are preferred, *i. e.*, the agreement is that the holder is entitled to a fixed dividend out of the available profits made by the company during the year under review, before the holders of ordinary, or deferred shares, are paid anything. If the preference is what is known as "simple preference", it gives the holder a right to claim a fixed percentage as dividend, out of the profits of each year, and therefore, if during any year, there are no profits available for dividend, the preference shareholders do not get any dividend during that year, nor can they claim the dividend not so paid out of the profits of any of the subsequent years. If, however, the preference is "cumulative", the shares carry the additional right under which dividends not paid during any year, owing to insufficiency of profits, accumulates to be paid during any subsequent year when the available profits are sufficient. The preference shares are **usually noncumulative** and the clause giving such a power generally makes this fact clear. Great care should be exercised in the drafting of the clause which describes this preference, and a bare statement to the effect that the preference shareholders are entitled to preferred dividends, at a specified rate per cent, will mean a cumulative right, whereas, if it is made clear that the preference is to attach to the profits of each year they shall be non-cumulative (*Staples v. Eastman Photographic Materials Co.*, 1896, 2 Ch. 303).

The preference right, however, may not only attach to the payment of dividends out of the profits but it may also attach to the return of the capital where they are termed "**participating preference shares.**" In such a case, in the event of liquidation, preference shareholders will be entitled to the return of their capital in full, after the ordinary creditors are paid, and before the ordinary as well as deferred shareholders get anything. This power, should of



course, be expressly reserved either in the memorandum or in the articles. The holders of preference shares and debentures of a company shall have the same right to receive or inspect balance sheets of the company, reports of auditors, etc., as is possessed by the ordinary shareholders in a joint stock company (S. 146).

The question frequently arises, when new preference shares are desired to be issued, whether this can be done by superseding the rights of the original preference holders. An answer to this can only be arrived at by carefully noting the language of the clause in which the rights of the original shareholders is reserved and ascertaining what is the exact nature of the bargain made with them. If it appears from the language that the intention to issue further preference shares, with priority (termed "**pre-preference** shares) on the rights of the present shareholders is contemplated, the original preference shareholders will have no reason to complain, otherwise the rights of the original preference shareholders cannot be postponed (*James v. Buena Ventura Syndicate*, 1896, 1 Ch. 466; *Underwood v. London Music Halls*, 1901, 2 Ch. 309). When preference shareholders have **participated** in accordance with their rights of preference, either out of profits, or out of capital, they shall have no further right to participate in the assets of the company unless otherwise provided for in the articles (*National Telephone Co. Ltd.*, 1914, 1 Ch. 755). In this case, *Sergeant J.*, in the course of his judgment said, "Looking at the way in which *Swinfen Eady, J.*, dealt with the question of the rights of winding up, as being analogous to the similar rights to dividend while the company is a going concern, and looking to the canon of construction which was applied by the Court of Appeal in *Wile v. United Lankat Plantations Co.*, 1912, 2 Ch. 571, it appears to me that the weight of authority is in favour of the view that, either with regard to dividend, or with regard to the rights in a winding up, the expressed gift or attachment of preferential rights to preference shares, on their creation, is, *prima facie* a definition of the whole or their rights in that respect, and negatives any further or other right to which, but for the specified rights, they

would have been entitled. In my opinion, therefore, this surplus is not divisible except among the deferred stock holders."

In a recent case, however, where the company's articles of association provided that dividends be paid out of "profits only", and further that, "in the event of winding up of the company the holders of the preference shares shall be entitled to have the surplus assets applied, first in paying off the capital paid up on the preference shares; secondly in paying off the arrears of preferential dividend, if any, up to the commencement of the winding up and thereafter to participate rateably with the holders of other shares in the residue, if any, of such surplus assets which shall remain after paying off the capital paid up on such other shares," it was held that there were arrears of dividends, although there never were any profits out of which the dividends could have been paid, and that, now that the winding up had commenced, the surplus assets were liable to meet not only the Capital of the preference shares, but also the whole of the 10 per cent (as in this case provided) preference dividend (*In re. Springbok Agricultural Estates, Ltd.*, 1920, 1 Ch. D. 563).

It may be added that there is no objection to articles being so framed as not to give the preference shareholders any right of voting and in such a case apart from some special provision in the articles preference shareholders who have no right of voting are not entitled to be summoned to general meetings (*In re. Mackenzie & Co. Ltd.*, 1916, 2 Ch. D. 450).

### **Redeemable Preference Shares.**

Our Indian Companies Amendment Act of 1936 following the English Act of 1929 has now provided in Section 105 B for the issue of redeemable preference shares. The English Act made this provision on the recommendation of the Greene Commission of 1925-26 on the ground that "the power to issue redeemable preference shares would prove useful in certain cases, and, provided that proper safeguards are adopted, we see no reason why this power

should not be given." According to the Special Law Officer's Report to the Government of India of 1935 "the needs of modern times require that the company should have the power to issue redeemable preference shares. It has certainly proved very useful in England that proper safeguard provisions for the issue of such shares should also be made in our Act." Now it is provided that *subject to the provisions of Sec. 105B, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be redeemed. This is subject to the conditions that (a) no shares are to be redeemed except out of profits of the company which would otherwise be available for dividend or, out of the proceeds of a fresh issue of shares made for the purpose of redemption or out of sale proceeds of any property of the company, (b) no such shares are to be redeemed unless they are fully paid (c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, the company must, out of the profits which would otherwise have been available for dividend, transfer to a reserve fund, a sum equivalent to the amount applied in redeeming the shares. This reserve fund, is to be called "Capital Redemption Reserve Fund" and the provisions of this Act relating to the redemption of the share capital of a company, except as provided in this section, shall apply as if a capital redemption reserve fund was the paid-up share capital of the company, and (d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed. Besides this the further condition in connection with such issue, is that in every balance sheet of a company which has issued redeemable preference shares, a statement shall be included specifying what part of the issued capital of the company consists of such shares and the date on, or before which these shares are, or are to be liable to be redeemed or where no definite date*

*is fixed for redemption, the period of notice to be given for redemption. Failure to comply with the provisions of this sub-section (2) of Sec. 105B shall entail on the company and every officer of the company, who is in default a fine not exceeding Rs. 1,000. The redemption of these preference shares may be effected on such terms and in such manner as may be provided by the articles of the company subject to the provisions of Sec. 105B.*

The further power given is that where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fee as payable under Sec. 249 be deemed to be increased by the issue of shares in pursuance of sub-section (4) of sec. 105B. Where however the new shares are issued before the reduction of old shares, the redeemed shares shall not, so far as relates to Stamp Duty be redeemed to have been issued in place of sub-section (4) to Sec. 105B unless the old shares are redeemed within one month after the issue of the new shares. Where these new shares have been issued in pursuance of Sec. 105B (4), the capital redemption reserve fund may be applied by the company, up to an amount equal to the nominal amount of the shares so issued in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares

It may be added in connection with the issue of redeemable preferential shares that the circumstances under which such an issue would be particularly valuable is where a company requires capital for expansion of its assets which it expects to repay out of profits at an early date and thus it provides for that capital, the dividends of which it will have to pay only during the period that such shares continue to be the capital of the company and are not

actually redeemed. Thus old shareholders would benefit in as much as they would reap the advantages and profits of these extensions made out of the capital raised on the redeemed preference shares.

### **Ordinary Shares.**

Ordinary shares are those shares which, in cases where there are preference shares also, receive their dividend out of profits after the preference shareholders are paid their dividends in accordance with the rights given to them by the regulations of the company. In the absence of any deferred, or founders' shares, the ordinary shareholders have a right to share all the profits left after the payment of preference shareholders, and after due provisions are made by the directors for depreciation, reserve fund, etc.

### **Deferred or Founders' Shares.**

Deferred, or founders' shares, are sometimes issued in limited numbers, and carry a right to dividend after a fixed percentage is paid to the preference and ordinary shareholders, respectively. Generally, holders of founders' shares are entitled to a division among themselves of the whole, or proportionate profits, left after the payment of the dividends to the first two classes named above, of course after all due provisions are made by the directors in accordance with the regulations of the company.

These shares came to be called founders' shares, because they were originally, *i. e.*, in the early days of joint stock enterprise, created to remunerate the founders of the company whose rights were deferred to those of the other classes of shareholders. The number of such shares issued must be shown in the prospectus and all contracts made with promoters or founders must be filed with the Registrar.

In practice, it was noticed later that, in certain speculative concerns, such as mining companies, the founders' shares

earned large profits. It is therefore the modern practice to allot founders' shares only to those who apply for a certain number of ordinary, or preference shares, with a view to attract capital in concerns where such founders' shares are considered a good investment. In concerns where these shares carry with them the right to the balance of profits, or a certain portion of the profits left out after distribution of dividends among the other classes, the tendency to set aside as little as possible for the reserve fund is great, particularly where the directors themselves hold a large number of these shares. Of course, it is entirely within the rights and powers of the Board of Directors, while ascertaining what is the profit available for dividend, to take as much to reserve fund as in their opinion and direction the interests of the company concerned require, or make it imperative, and in doing so they need not be restrained by the idea that the founders' shares do not get any dividend (*Fisher v. Black and White Publishing Co.*, 1901, 1 Ch. 174).

In one case it was decided that the exchange of founders' or deferred shares, for a larger amount of ordinary shares, amounted to an issue of the said shares at a discount and was therefore bad (*Development Co. of Central and West Africa*, 1902, Ch. 547).

It is best to provide in the articles to the effect that the premium on issue of shares is not to be reckoned as a profit divisible among the holders of the founders' or deferred shares, as otherwise, they will be entitled to claim it as such (*Re. Hoare & Co.*, 1904, 2 Ch. 208).

Mr. Palmer in his "Company Precedents" states as follows while dealing with founders' or deferred shares:—

"In the case of founders' and deferred shares, the terms of issue not unfrequently lead to difficulty and dispute as regards the determination of the amount of the profits to be distributed. The holders of the founders' shares may complain that too much is carried to reserve, that the profits are ascertained on too conserva-

tive a basis, and that, the directors unduly favour the other shareholders. On the other hand, if dividends on a large scale are paid on the founders' shares, the other shareholders commonly complain that the founders get too much, that the directors unduly favour them, and that the desire to pay a dividend to the founders leads to speculative business, and diverts to the founders shareholders' pockets what ought to go to reserve. Those difficulties can, to a great extent, be met by giving to the holders of the founders' shares, as in the above form, a fixed aliquot share in the profits which it shall be determined to distribute, and not merely in the surplus profits themselves."

### **The Reserve Capital**

In the case of companies like banking companies, where financial credit is of considerable importance, a certain portion of its capital is declared to be uncallable during the regular course of the existence of the company, and is **only to be called in case of winding up**. It is thus possible to provide for a substantial amount available **for the benefit of creditors** in case the company was to be wound up through failure of the enterprise. Sec. 69 of our Act of 1913 lays down that :—

A limited company may, by **special resolution**, determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

With regard to unlimited companies Sec. 68 lays down that :—

An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely :—

- (a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall

ne capable of being called up except in the event and for the purposes of the company being wound up ;

- (b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

This reserve capital once created cannot be **altered into ordinary capital**, without the leave of the Court and this reserve liability cannot even be charged or mortgaged by the directors (*Bartlett v. Mayfair Property Company*, 1898, 2 Ch. 28). It may however be added that in considering the solvency, or otherwise, of the company the figure of reserve liability cannot be reckoned among assets (*Bristol Joint Stock Bank*, 1890, 44 Ch. D. 703).

There is one more question of importance applying to reserve capital, viz., **whether the same can be charged or mortgaged by** the company under a power in its memorandum or articles to charge its uncalled capital. Lindley M. R. in *re Mayfair Property Co.*, 1898, 2 Ch. 28 laid down that it **cannot be done**. According to his Lordship, the Act of 1879, which brought the "reserve liability" into existence as a system, aimed at (1) preserving for the general creditors of the company the funds which the members were liable to pay but which the directors could not call up and (2) enabling the members to limit the amount of their liability on a winding up to pay the creditors more than the amount preserved for them. The first object would be entirely defeated if the reserved capital could be charged or mortgaged. Palmer (p. 289 *Palmer's Company Law*, 25th Edn.) differs from this view as according to him "the words of the Act do not justify the conclusion." However, this is the law as long as this unanimous judgment of the Appeal Court made up of eminent judges is not upset.

## Stock

Stock has been described as "simply a set of shares put together in a bundle" (*Morrice v. Aylmer*, (1875) L. R. 7 H. L.



725). It is capital consolidated into a mass for convenience, and is in fact the holding of the stockholder expressed in pounds or rupees, as the case may be, instead of in so many shares of so much each.

As stock is not divided into equal amounts, nor are the divisions numbered, any fraction may be transferred unless forbidden by the articles.

A company cannot make an original issue of stock, but if the articles permit, fully paid up shares may be converted into stock, and the Registrar must be notified of this conversion.

Stockholders are members and are therefore entitled to vote at the company's meetings.

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## CHAPTER IX

### ADMINISTRATION AND MANAGEMENT

We have already seen how the incorporation of a company takes place, and have carefully considered the documents which are required to be filed with the registrar of joint stock companies for the purpose of the said incorporation, on the fulfilment of which requirements the certificate is issued to the company by the registrar known as the **"certificate of incorporation."** The first thing which a company should have, is a **registered office**, where the company expects notices and communications to be addressed to it. The situation of this registered office of the company, and any change in it, must be filed with the registrar from time to time, to be recorded by him. This requirement has to be very strictly complied with, as any failure in this direction leads to a fine not exceeding Rs. 50, for every day during which this default continues. It is also important to note the situation of the registered office of the company, with a view to determine what Court shall have jurisdiction in the matter (S. 72).

#### **The Name of the Company**

The other requirement to be immediately observed on incorporation is that, the company shall append, or fix, its name on the **outside of every office** or place in which its business is carried on (S. 73). This name is to be kept so appended or fixed all throughout the career of the company in a **conspicuous position**, in letters easily legible and in English characters. In case the company is situated outside the limits of the ordinary original civil jurisdiction of a High Court, the name should also be inscribed in one of the vernaculars used in that place. Besides this, the **seal** of the company has to bear the name of the company in legible characters, and all bill-heads, letter-papers, notices, advertisements,

bills of exchange, *hundis*, promissory notes, endorsements, cheques or orders for money or goods purporting to be signed by or on behalf of the company, bills of parcels, invoices, receipts and letters of credit of the company should bear the company's name in legible English characters. Failure to comply with this requirement will result in a fine (Secs. 74 and 75). It has been held in this connection that trade-marks were not "advertisements" necessitating the mention thereon of the applicant company's name in legible characters (*In re Albert Bank & Co.*, 1903, 2 Ch. D. 86). This fine will be levied even though the name so given was incorrect. This name has to bear the word "**limited**" which may also be abbreviated into "Ltd." or "Ld."

However, in case of **associations** formed as limited companies or about to be formed for **promoting commerce, art, science, religion, charity** or any other useful object which applies or intends to apply its profits (if any) or other income in promoting its objects and prohibits the payment of any dividend to its members, the Central Government may by **license** direct that the association be registered as a company with limited liability without the addition of the word "limited" to its name. The Central Government may grant the license on such conditions and subject to such regulations as they think fit. In **English Law** also the rule is the same, the only difference being that a license must be obtained from the Board of Trade instead of the Central Government as in India.

The privilege of using the word "limited" in connection with the name is restricted to duly incorporated limited liability companies, and if any person, or persons, trade or carry on business under any name, or title, to which "limited" is the last word without being duly incorporated, they are liable to a fine not exceeding Rs. 50 per day. (Sec. 282)

### **Commencement of Business**

Our Companies Act, Sec. 103, lays down various **restrictions** as to the commencement of business of a company other than a

private company or a company registered before the commencement of the Act of 1913. It lays down to the effect that :—

A company shall not commence business or exercise any borrowing powers unless :—

- (a) shares held subject to payment of the amount therefor in cash have been allotted to the amount not less than the **minimum subscription**; and
- (b) every **director** of the company **has paid** on each of the shares taken or agreed to be taken by him and for which he is liable to pay cash the proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or in case the company does not make a public offer on the shares payable in cash; and
- (c) a duly verified **declaration** by the secretary or director is filed with the registrar in the prescribed form; and
- (d) where a **prospectus** has not been issued to the public, the statement in lieu of the prospectus is filed with the registrar.

On these conditions being fulfilled the registrar shall issue a **certificate** to the effect **that the company is entitled to commence business**, which certificate shall be **conclusive evidence** that the company was so entitled. The duty of the registrar in this regard is purely ministerial. With regard to conclusiveness the same arguments apply here as in the case of the certificate of incorporation with which we have already dealt. In case the company commences business or exercises borrowing powers without complying with these requirements, every person responsible will be liable to a fine not exceeding Rs. 500 for every day during which the default continues. With regard to the verified declaration under Sec. 103 (1) (c) by the secretary or director according to No. 3 above, any false declaration would make the officer concerned liable to serious penalty (imprisonment of either description for a term which may extend to three years and also a fine) as provided for under Sec. 282 (*Emp. v. S. M. Bose*, 46 All. 218). These prohibitions of course do not

**apply to private companies** or companies formed before the commencement of the Act of 1913. This regulation will apply however to associations not for profit as well as to unlimited companies, as they are in law public companies. The importance of this certificate entitling companies to commence business is, as we have seen already that unless the company is entitled, to commence business, all contracts entered into by it prior to that are provisional only and will not bind the company until it becomes so entitled. Thus if the company never becomes entitled to commence business, contracts entered into by it never become binding (*In re. Otto Electrical Mfg. Co.*, 1906, 2 Ch. D. 390). The exact language of sub-section 3 of Sec. 103 is :—

“Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.”

In this connection *Swinfen Eady L J. In re Blair Open Hearth F. Co. Ltd.* 1914, 1 Ch. D. 390 at page 408. has laid down that “All that the certificate is conclusive evidence is that the company is entitled to commence business, that is to say, the persons entering into contracts and otherwise dealing with the company may give faith to the certificate that the company is entitled to commence business.” In this case the certificate was obtained on filing a statement in lieu of prospectus, among other requisite documents, in which the required particulars were not properly and accurately stated and it was sought to get the whole allotment declared void. This was refused as the statement, however inaccurate, was actually filed and the certificate issued.

### **Administration and Management**

The administration of a company is carried on with the help of a certain number of officers and a **Board of Directors**. The officers may be the **manager** or the **managing agent**, or

**managing director**, the **secretary** and others. The idea here is that the general body of the shareholders, or members of the company, elect a certain number of persons as directors according to the constitution of the company with the exception of the first directors who are selected by the promoters and founders. According to the **Indian Companies (Amendment) Act of 1914, Sec. 93A**, it is compulsory for every **public** company to have at least **three** directors. In **English Law** **two** directors are required as the minimum in such cases. A private company, however, need not have any directors. We shall deal with the powers, duties and obligations of the directors in a separate chapter, but for the present, it is sufficient to say that the powers of the directors largely depend upon the articles and the memorandum of association of the company concerned. The principal officer, who is in most cases the mouth-piece of the board, is the secretary. Frequently, there is a managing director who is generally a full-time officer. In fact he holds the position of a manager and a director in combination.

The decisions of important questions are arrived at **meetings** either of the Board of Directors, or of the members or shareholders, as the case may be, and in this regard also, the constitution of the company will exercise considerable influence in connection with control. Before the holding of these meetings, an **agenda**, i.e., a list of business, is taken in hand according to this agenda. Proceedings of the meetings are taken down by the secretary in a special **minute book** kept for the purpose according to Sec. 83 which runs as follows :—

- (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.
- (2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.
- (3) Until the contrary is proved, every general meeting of the company or meeting of the directors in respect of the proceedings whereof

minutes have been so made, shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

- (4) *The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1930, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.*
- (5) *Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.*
- (6) *If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine to twenty-five rupees for every day during which the default continues.*
- (7) *In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.*

The law in connection with minutes of proceedings of general meetings and of its directors is the same now both in India and England.

The **minutes** as recorded in the minute book and signed by the chairman are to be received, **not** as **conclusive**, but as *prima facie* evidence of resolutions and proceedings at general meetings (In *Re Indian Leodone Company*, 1882, 26 Ch. D. 70; also see *Rebello v. Co-operative Navigation & T. Co.*, 26 Bom. L.R., 907 at p. 915). Again the minutes of a meeting are **not exclusive** evidence of what takes place there. An unrecorded resolution

may be proved *aliunde* (In *Re Fire-proof Doors Ltd.*, 1916, Ch. D. 142). In one case where the articles prescribed that the disclosure of manager's interest should be entered on the minutes, the Court held that as the entry on the minutes of his remuneration resolution was not made within a reasonable time he could not recover (*Toms v. Cinema Trust Co.*, 1915, W. N. 29). It has also been held that a **loose-leaf ledger is not a proper minute-book** (*Hearts of Oak Assurance Co. v. Flower & Sons*, (1936) Ch. 76).

### MANAGING DIRECTORS

Frequently directors appoint one of their number as a managing director, to look after in detail the management of the company. Here **two offices**, namely that of the manager and the director, are **merged** into one person.

Here it will be interesting to note that our Indian Companies (Amendment) Act of 1936, now specifically defines a manager as distinguished from a managing agent, which definition must be usefully considered in connection with discussion of the position of the managing directors because, as we have already seen, a managing director is a director who is a manager. The **definition of a manager** according to Sec. 2 (1) (9) is as follows:—

*"Manager" means a person who, subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not.*

In order to appoint such a managing director and to delegate to him such powers of the board as may be deemed necessary, power must be given to the company by special articles as is generally the case (*Nelson v. James Nelson & Sons*, 1914, 2 K.B. 770). The company in general meeting may also empower the directors to appoint a managing director (*Boschoek Proprietary Co. v. Fuke*, 1906, 1 Ch. 148). Once the directors are given the power to appoint managing directors, the company cannot interfere with the discretion of the directors in the exercise of these powers (*Logan Ltd. v. Davis*, 1911, 104 L.T. 914).



Where articles already give power on delegation to the board of Directors, a **stranger** dealing *bona fide* with a managing director has a right to take it for granted that the said officer had all the powers he claimed to possess (*Biggerstaff v. Rowatt's Wharf*, 1896, 2 Ch. 93); but this does not apply to one who did not know of the power of delegation (*Houghton & Co. v. Nothard, Lowe & Co.*, 1927, 1 K.B. 246).

### MANAGING AGENTS

**In India** we have a peculiar system in operation in connection with the management of our companies under which a firm of merchants or a private limited company is appointed a manager or managing agent of a number of companies. In most cases the managing agents are themselves promoters of the companies, and, as such, take a leading part in the settlement of various questions of preliminary contracts with the company they are promoting as founders and of which they propose ultimately to become managers in the garb of managing agents. In spite of the fact that the managing agency system has existed in India for more than half a century, the Indian Companies Act not only failed to define a managing agent but even failed to mention the expression "managing agent" anywhere within the fold of its 290 sections. This anomaly has now been removed by the **Indian Companies (Amendment) Act of 1936** and now not only are **managing agents defined** by the Act in a series of sections, *viz.*, Secs. 87A, to 87I, but the various incidents applicable to managing agency work and organisation have been provided for in the light of past experience of the working of the system. The idea dominant in the mind of the legislature has naturally been to see that without in any way restricting the expansion and growth of company organisation on which our Indian industries largely depend, they should bring the managing agency organisation within the **control** both of the shareholders as well as the law in such a way as would tend to increase the confidence of the investors on the one hand, and on the other hand protect an honest and first class managing agent

from unequal competition of adventurers appearing on the market with fantastic schemes of more or less mushroom growth.

Thus the Act now **defines** the managing agents in Sec. 2 (9A) as follows :—

*“Managing Agent” means a person, firm or company entitled to the management to the whole affairs of a company by virtue of an agreement with the company and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement, and includes any person, firm or company occupying such position by whatever name called :*

*Explanation :—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.*

It will be seen from the above definition that a very able attempt has been made to bring within the purview of the definition not only the explanation of what the system happens to be, but also to prevent persons assuming other garbs or names though they may be actually *de facto* acting as managing agents and thereby escaping the provisions of the Act. The definition was drafted after considerable difficulty and it is to be seen how far it works satisfactorily in practice. It is however in the opinion of the author a very bold attempt to tackle a rather difficult and complicated problem.

### **Terms or Period of Managing Agency Agreement.**

The greatest opposition offered to the managing agency agreements from the standpoint of the investors by the Bombay Shareholders' Association was the length of the terms of managing agency contracts. A term of fifty years was not uncommon and in many cases it was provided in addition that after the expiry of the said term the agents could continue until they resigned and the agency contract itself was expressed to have been entered into between the company and the agents, their heirs, successors and assigns. It has been now laid down in this connection that :—

*“No managing agent shall after the commencement of the Indian Companies (Amendment, Act, 1936, be appointed to hold*

*the office for a term of more than 20 years at a time. However, with regard to those who were appointed prior to the commencement of the Act, it is laid down that notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company, a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of 20 years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said 20 years. In case of old managing agents it is further provided that upon such termination such managing agents shall be entitled to a charge upon the assets of the company by way of indemnity for all liability or obligations properly incurred by the managing agents on behalf of the company subject to existing charges and encumbrances if any and that the termination of the office of the managing agent by virtue of these provisions shall not take effect until all moneys payable to the managing agents for loans made to or remuneration due up to the date of such termination from the company are paid. This section is not to apply to a private company which is not the subsidiary company of the public company" (S. 87A).*

It will be seen from this that the rights of the old managing agents appointed prior to the Act have been preserved for a further period of 20 years after the commencement of the Act in case their agreements are lengthy enough to exceed this period. The other protection given to them is that in case they have advanced any money or incurred any personal liability on behalf of the company, they would naturally have a right to be indemnified for it and that the termination of their office is not to take effect until all moneys payable to them for loans made to the company or any remunerations due up-to-date are paid.

### **Conditions Applicable to Managing Agents.**

It is further laid down that "*notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company, a company may by a resolution passed at a general meeting of which notice has been given to the managing agent in the usual manner as to members of the company, remove a managing agent, if he is convicted of an offence in*

*relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, nonbailable. For the purpose of this clause where a managing agent is a firm or a company, an offence committed by a member of such a firm or a director or an officer holding the general power of attorney from such firm is to be deemed to be an offence committed by such firm or company. Provided that in such cases the managing agent shall not be liable to be removed if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within 30 days from the date of his conviction or if his conviction is set aside on appeal" (S. 87 B (a)).*

### **Insolvency or Transfer of Office by Managing Agents.**

In case of **insolvency**, the office of a managing agent shall be vacated (S- 87B (b)), and it is further laid down that a **transfer** of his office by a managing agent shall be void unless it is approved by the company in a general meeting 'S. 87B (c)'. Thus now it is not possible for a managing agent to transfer his office without consulting the company or the shareholders in general meeting. It is however provided that in case where a managing agent's firm changes partners, that shall not be deemed to operate as a transfer of the office so long as one of the original partners shall continue to be a partner of the managing agent's firm. The original partners for this purpose means in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of appointment (S. 87B).

Now under the new Act a **charge** or **assignment of remuneration** or any part thereof effected by a managing agent will be void as against the company (S. 87B (d)).

### **Compensation to Managing Agents.**

It is usual for managing agents to provide in their agreements with the company for a compensation to be paid to them in case

their term of office is cut short through the company going into liquidation. It was admittedly undesirable that in case the liquidation was brought about through the **negligence or default** of the managing agent himself that he should still be entitled to sue for and recover anything by way of compensation and thus now the new Act provides :—

*"If a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon terminated without prejudice, however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself, the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management" ( S. 87B (e)).*

### Appointment of Managing Agents.

It is now laid down that **"the appointment of a managing agent, the removal of a managing agent, and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything contained in Sec. 86E. Provided that nothing contained in this sub-section shall apply to the appointment of the company's first managing agent made prior to the issue of the prospectus or statement in lieu of the prospectus where terms of appointment of such managing agent are set forth"** (S. 87B (f)).

### Remuneration of Managing Agents.

In connection with the remuneration chargeable by managing agents who are appointed after the commencement of the Indian Companies (Amendment) Act of 1936, it is laid down that :—

**"The remuneration shall be a sum based on a fixed percentage on net annual profits of the company, with provision for**

*a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management (S. 87C (1)). Any stipulation for remuneration additional to or in any other form than the remuneration specified above, it shall not be binding on the company unless sanctioned by a special resolution of the company" (S. 87C (2)).*

Thus now all agreements with the company by managing agents for remuneration in form other than a percentage on profits, etc., such as a percentage on sale, etc., will be void unless they are sanctioned by a special resolution of the company concerned.

The next point to be noted is that "**net profits**" on which remuneration of managing agents is to be calculated are **specifically defined** by the Act instead of leaving them to be defined in the managing agency agreements according to the whims of the agents concerned. It is now laid down that "net profits" for this purpose means :—

*"The profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from Government or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund" (Sec. 87C (3)).*

The above section does not apply to a private company except the private company which is the subsidiary company of a public company or to any company whose principal business is insurance (S. 87C (4)).

### **Loans to Managing Agents.**

Under the old Act the managing agents could borrow money and did borrow in a large way which resulted in the failure of

many concerns due to losses suffered by the said agents in their own personal private businesses. The Amending Act of 1936, has now enacted :—

*"No company shall make to a managing agent of the company or to any partner of a firm of managing agent or to any director of the private company if the managing agent is a private company any loan out of the moneys of the company or guarantee a loan made to a managing agent (S. 87D (1)). This of course does not prevent and is not applicable to any credit held by a managing agent in a current account maintained subject to limits previously approved by the Board of Directors of the company with the managing agent for the purposes of the company's business (Sec. 87D (2)). If this rule is contravened in any way, any director of the company who was a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to rupees five hundred and if default is made in re-payment of the loan or discharging the guarantee the said director shall be liable jointly and severally for the amount unpaid." (S.87D)).*

This section does not apply to a private company except the private company which is the subsidiary of a public company.

### **Contracts by Managing Agents for Purchase and Supply of Goods to Companies.**

Except with the **consent of three-fourths of the directors** present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase and supply of goods and materials with the company. The rule of course does not apply to or affect any contract for such sale, purchase and supply entered into before the commencement of the Indian Companies (Amendment) Act of 1936 ( S. 87D (b) ).

### **Inter-Company Loans and Purchase of Shares.**

A practice had grown up by which it was universally common for companies under the same managing agents to lend and borrow

from one another large amounts of money. It was discovered that in a good many cases a sinking company was propped up by managing agents with a view to maintain their own remuneration for the management, through making some other prosperous company under their management advance money to the sinking concern. In some cases this money was advanced through the purchase of debentures issued by the company in a less favourable position, as an investment on reserve fund by the stronger company. In other cases, a still more undesirable practice prevailed of borrowing on fixed deposits on the credit of a substantial company under the same management, with a view to lend that amount to a weaker company which had no such credit. This naturally resulted in the weakening and in many cases the ruin of many good companies through the failure of the weaker borrowing companies.

The new Indian Companies (Amendment) Act of 1936 now provides that :—

*"No company incorporated under the Act after the commencement of the Amending Act of 1936 which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management of the same managing agent and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company. This rule is not to apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company or to a subsidiary company thereof or the guarantee given by a company on behalf of a subsidiary company thereby (Sec. 87E (1)). Any contravention of this provision would entail a fine not exceeding rupees one thousand on any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default and he shall be also jointly and severally liable for any loan incurred by the company in respect of such loans or guarantee" (S. 87E (2)).*

In connection with the purchase of shares it is laid down that :



*"A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the Board of Directors of the purchasing company" (S. 87F).*

### **Managing Agents' Power to Issue Debentures.**

It is now laid down that :—

*"The managing agent shall not exercise in respect of any company of which he is a managing agent the power to issue debentures, or except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of such power by a company to a managing agent is void. (S. 87G).*

### **Managing Agents' Competing Business and Nominee Directors.**

In this connection it is laid down by the new Amendment Act that :—

*"The managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by company under his management or by a subsidiary company of such company (S. 87H)."*

With regard to the limits of the powers to appoint nominee *ex-officio* directors, it is now laid down that :—

*"Notwithstanding anything contained in the articles of a company other than a private company the directors, if any appointed by the managing agent, shall not exceed in number one-third of the whole number of directors. (S. 87I).*

## Meetings of Shareholders or Members

The meetings of shareholders or members held in connection with the working and administration of the company are :—

- (1) The **Statutory Meeting**.
- (2) The **Annual General Meeting**, otherwise known as **Ordinary Meeting**.
- (3) The **Extraordinary Meeting**.
- (4) The **Class Meeting**.

We shall now proceed to consider each of these meetings separately.

### Statutory Meeting

This meeting is virtually speaking the **first** meeting that a joint stock company usually holds and the **object** seems to be to ensure that at the earliest opportunity the members of the company should have an opportunity to secure first-hand information as to the exact position of the company, particularly in relation to its financial success in floatation, as well as other information as to the investment of its capital in the different branches of the enterprise for which the company is incorporated.

The Indian Companies Act, Sec. 77 lays down that :—

(1) *Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.*

(2) *The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as "the statutory report") certified as required by this section to every member of the company and to every other person entitled under this Act to receive it.*

(3) *The statutory report shall be **certified** by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state :—*

- (a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which these have been allotted;*
- (b) the total amount of cash received by the company in respect of all the shares allotted distinguished as aforesaid ;*
- (c) an **abstract of the receipts of the company and of the payments** made thereout up to a date **within seven days** of the date of the report exhibiting under distinctive headings the receipts of the company from shares, debentures and other sources, the payment made thereout and particulars concerning the balance remaining in hand, and an account or estimate of the **preliminary expenses** of the company showing separately any commission or discount paid on the issue or sale of shares;*
- (d) the names, addresses and descriptions of the directors auditors, managing agents and managers, (if any) and secretary of the company and the changes, if any, which have occurred since the date of the incorporation;*
- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification;*
- (f) the extent to which **underwriting contracts**, if any, have been carried, out ;*
- (g) the **arrears**, if any, due on calls from directors, managing agents and managers ; and*
- (h) the particulars of any **commission or brokerage** paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm, or if the managing agent is a private company, a director thereof.*

(4) *The statutory report shall, so far as it relates to the shares allotted by the company and to the cash received in respect of such shares and to the receipts and payments of the company, be **certified as correct by the auditors of the company,***

(5) *The directors shall cause a **copy of the statutory report, certified as required by this section to be delivered to the registrar for registration forthwith, after the sending thereof to members of the company.***

(6) *The directors shall cause a **list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting and to remain open and accessible to any member of the company during the continuance of the meeting.***

(7) *The members of the company present at the meeting shall be at liberty to **discuss** any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no **resolution** of which notice has not been given in accordance with the articles may be passed.*

(8) *The meeting may **adjourn** from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed and an adjourned meeting shall have the same power as an original meeting.*

(9) *If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.*

(10) *In the event of any **default** in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.*

(11) ***This section shall not apply to a private company.***

From the above section it will be noticed that the meeting has to be held within a **period** of not less than one month nor more than six months from the date at which the company is

entitled to commence business. In case of a **private company** it is entitled to commence business from the date of registration whereas in case of a **public company** it cannot commence business unless after incorporation it has carried out various regulations of the law, and satisfied the registrar of joint stock companies that this has been done. The registrar, when satisfied it has done so, issues a certificate called a "certificate entitling the company to commence business". It may be noted that Sec. 77 which provides for the holding of a statutory meeting, and issue and registration of a statutory report, does not, according to Sec. 77 (11), apply to a private company.

Another requirement is that the **notice** convening the statutory meeting must state that it is the statutory meeting (*Gardner v. Iredale*, 1912, 1 Ch. 700).

**Default** in holding this statutory meeting or in filing the statutory report is, under Sec. 162 of the Indian Companies Act, 1913, a **ground for winding up** of the company

The **statutory report** has to be sent to all members together with a notice of the meeting at least ten days before the day on which the meeting is held; this includes not only the holders of ordinary shares, but also those who hold preference shares. The debenture holders are also entitled to receive this statutory report (Sec. 146 of the Indian Companies Act). The statutory report, as far as it relates to the shares allotted by the company and the cash received in respect of the shares, *plus* receipt in payment of the company on capital account, must be certified as accurate by the auditors of the company. In the case of public companies this report must be **filed** with the registrar forthwith after sending it to the members of the company.

The above rule of law is mostly the same as that of the English Act. In the **English Act** the statutory meeting has to be called within not less than **one month** and not more than **three**

**months** instead of not more than six months as in case of the Indian Act. The statutory report is required to be sent by our Indian Act at least 21 days before the day of the meeting whereas in the English Act it is to be sent **7 days** before the meeting. The English section does not contain clauses (f), (g) and (h) to sub-section (3) of our Sec. 77. These have been added by our Indian Companies (Amendment) Act of 1936.

### GENERAL MEETING

A general meeting of a joint stock company is a meeting of its members, or of its shareholders duly convened according to the terms and conditions of the articles of association or requisition of members as provided for by Sec. 78 of the Indian Companies Act. *Prima facie* all shareholders of the company are at liberty to attend this meeting. Sec. 76 of the Indian Companies Act lays down in connection with the general meeting as follows :—

(76) (1) *A general meeting of every company shall be held within **eighteen months** from the date of its incorporation and thereafter **once at least in every calendar year** and not more than **fifteen months** after the holding of the last preceding general meeting,*

(2) *If **default** is made in holding a meeting in accordance with the provision of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.*

(3) ***default** is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.*

The above section makes it **compulsory** to hold the annual general meeting.

(1) *within eighteen months from the date of its incorporation, and thereafter,*

(2) once at least in every **calendar year**, and

(3) not more than **fifteen** months after the holding of the last preceding general meeting.

Failing compliance with any of these requirements, an offence is committed and the fine as provided for by this section will be levied. The **calendar year**, of course, commences from 1st January and ends on 31st December (*Gibson v. Barton*, 1875, L. R. 10 Q. B. 329). If the meeting is not called at least once in the calendar year, and is also not called within the fifteen months from the date of the last meeting, two separate offences are committed and the party charged will be separately fined for each offence (*Smedley v. Companies' Registrar*, 1919, 1 K. B. 97). Of course in the case of default in calling the meeting the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company (Sec. 76 (3)).

A further point to be remembered is that when the articles of association of the company concerned make a distinction between an ordinary and an extraordinary general meeting, the extraordinary meeting held on the requisition of shareholders does not come within the definition of general meeting under Sec. 76 (*Emperor v. Nasur*, 1923, 25 Bom L. R. 224). In *Gibson v. Barton*, referred to above *Blackburn, J* laid down that "no individual director, nor a manager, probably has the power, certainly no one of them has the strict legal right, to call a meeting. A meeting is to be called **by order** of the directors and not by any individual person." In one case where the Secretary on a requisition sent out a notice convening an extraordinary meeting which purported to be issued **by order** of the board, when in fact no such order was issued, it was held that on ratification by the directors of the said notice it became good for all purposes (*Hooper v. Kerr Stuart & Co., Ltd.*, 1900, 83 L. T. 729). In case of a meeting of the subscribers of the memorandum any reasonable notice will do. In one case two days' notice was held sufficient (*John Morley Building Co. v. Barras*, 1891 2 Ch. 336). In case of urgency a mandatory injunction is

granted by the Court directing the directors to call a meeting forthwith as was done in England under Sec. 66 (1) of the Act of 1908 corresponding to our section of the present English Act of 1929 (*Rutherford v. Farmery*, 1915, R. No. 1524; *Ashbury J.* 12 Nov. 1915). The new English Act has now provided for the expenses of requisitionists being paid out of the directors' remuneration if they wrongfully make default in calling a meeting, and has given the Court the power to call the meeting if it is impracticable to do so in the manner prescribed by the articles on the application of a director or any member entitled to vote, or on its own motion (Sec. 115 (2) of the English Act of 1929).

It may be noted that the English Act does not provide for the meeting being held within 18 months from the date of its incorporation but simply states to the effect that the annual general meeting shall be held **once at least in every** year which means of course **calendar year** and **not later than 15 months** from the previous meeting.

To stop a general meeting of the company by the Court, a very strong case has to be presented (*Isle of Wight Ry. Co. v. Tahourdin*, 1883, 25 Ch.D.320). We have seen that where a company fails to hold its annual general meeting in proper time any member of the company may apply to the Court and the Court may call, or direct the calling of, the said meeting.

**Minutes** of the proceedings of these meetings must be recorded in a book kept for the purpose, and shall be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting when they shall be evidence of the proceedings.

The **notice** of the general meeting must be given to the members in **Indian law** at least fourteen days and in English law at least seven days before the date of the meeting because omission to do so *prima facie* invalidates the meeting (*Smyth v. Darley*, 1849, 2 H.



L.C. 789). The articles of association of a good number of companies provide that accidental omission shall not invalidate the meeting, in which case, the provision shall apply. The executors or administrators of deceased members are not entitled to notice unless registered as members, and unless the articles provide otherwise (*Allen v. Gold Reefs of W. Africa*, 1900, 1 Ch. 656).

**The usual business of a general meeting is :—**

(1) To receive the directors' report of the work done during the period preceding the date on which the meeting is held,

(2) to receive the profit and loss account and balance sheet duly audited by the auditor of the company,

(3) to consider the auditor's report which is generally attached to the balance sheet. The auditors' report has to be read before the company in general meeting, and shall be open to inspection by any member of the company.

(4) to declare the dividend, if any,

(5) to elect the directors in the case of vacancies, and

(6) to appoint an auditor for the next year and fix his remuneration.

Any other business is considered to be special and due notice has to be given. The articles of association generally set out the nature of business which is to be done at this ordinary meeting, and in some companies they provide that the meeting be held half-yearly. The usual practice is to provide in the articles for at least seven days' notice. It is at this meeting that the shareholders are in theory supposed to exercise control over the company, the nature of which control will undoubtedly depend on the powers left to individual shareholders as to voting in the memorandum or the articles of association of the company. Where *prima facie* directors were improperly appointed they were restrained from presiding over a meeting called by them as an extraordinary general meeting (*Harben v. Phillips*, 1883, 23 Ch. D. 14).

If the directors' report as presented at the general meeting is not accepted, it amounts to a **vote of censure** on the directors, but it has no further effect, as it is not necessary that the report should be accepted. **Now under the Indian Companies (Amendment) Act 1936**, the company may by **extraordinary resolution remove** any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed director. A director so removed shall not be re-appointed a director by the board of directors (Sec. 86 G(1)). Some articles of association also give the members power to remove the directors. In the absence, however, of being able to remove the directors on account of the requisite majority for an extraordinary resolution not being available the shareholders may adopt the plan of waiting till each one of them retires by rotation, and re-elect whomsoever they please.

With reference to meetings in general the Indian Companies (Amendment) Act of 1936, Sec. 79 has made detailed provision which section is substituted for the old Indian section and now following Sec. 115 of the English Act.

The **English Act** provides for a **seven days' notice** for the general meeting, our **Indian Act** provides for a notice of not less than **14 days**. Clauses (c), (d) and (e) of sub-section given below are not found in the English Act.

Section 79 runs as follows :—

Sec. 79 (1) *The following provision shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf :—*

- (a) *a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit;*
- (b) *notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by 'Table A and for the purpose of this clause the expression 'Table A' means that table as for the time being in force; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting;*
- (c) *five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll: Provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll;*
- (d) *an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles; and*
- (e) *any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.*

**(2) The following provision shall have effect in so far as the articles of the company do not make other provision in that behalf:—**

- (a) *two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent in*

*number of the members of the company may call a meeting;*

- (b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum ;*
- (c) any member elected by the members present at a meeting may be chairman thereof;*
- (d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote ;*
- (e) on a poll votes may be given either personally or by proxy ;*
- (f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation, either under seal or under the hand of an officer or an attorney duly authorised; and*
- (g) a proxy must be a member of the company.*

*(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such auxiliary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.*

The **English Act** does not contain clauses (e) and (f) in sub-section (2) of the above which have been specifically added by our new Amending Act.

**Inspectors appointed by the Company and the Government.**

Section 142 of the Indian Companies Act gives the company the power to appoint inspectors to investigate its affairs by a **special resolution**, which power may be exercised by the company if necessary. Failing this, the powers under Sec. 138, namely that of **applying to the local government** for one or more competent inspectors to investigate the affairs of the company, and to report upon it, may be resorted to. The section leaves open the following four courses in the following circumstances :—

- (i) in the case of a **banking company** having a share capital, on application of members holding not less than **one-fifth** of the shares issued,
- (ii) in the case of any **other company** having a share capital, on the application of members holding not less than **one-tenth** of the shares issued ;
- (iii) in the case of a company **not having a share capital**, on the application of not less than **one-fifth** in number of the persons on the company's register of members ;
- (iv) in the case of a company, on a report by the Registrar under Sec. 137, sub-section (5).

According to **English Law** such inspectors may be appointed either by the **company** itself by passing a special resolution **or** on an application to the **Board of Trade**. Such application is to be made (according to Sec. 135 (1) of the English Act) in the same proportions as those required by the Indian Act with this **one difference** viz; in the case of a **banking company** having a share capital, in which case the English Act requires the application to be made by members holding not less than **one-third** of the shares issued instead of one-fifth of the Indian Act.

These inspectors shall have the **right** to examine on oath any person in relation to the company, or its business, and of calling upon all who have been officers of the company, to produce all books and documents relating to them in their custody or power. On the conclusion of their investigations the inspectors shall present

their report. This **report**, or a certified copy of it, authenticated by the seal of the company concerned, is admissible in legal proceedings as evidence of the opinion of the inspectors relating to matters contained therein.

### Extraordinary Meeting

Over and above the two types of meetings discussed above, other meetings may be held to **consider special questions**. These are known as "Extraordinary General Meetings".

The period of **notice** is the same as in the case of Ordinary General Meetings i.e. 14 days in Indian law and 7 days in English Law. At these meetings only special business of which notice has been given can be transacted, and in case of "**extraordinary resolutions**" to be passed, the notice must specify the intention to propose the resolution as an extraordinary resolution (S. 81 (1) ) which means that **the actual resolution must be set out in the notice**. There is considerable doubt whether an amendment on such a resolution can be moved, but Palmer lays down that an amendment which comes within the scope of the notice and does not commit the meeting to anything more onerous than the resolution, can be moved. It may be mentioned that as regards special resolutions there is no objection to an amendment (*Torbock v. Lord Westbury*, 1902, 2 Ch. 871; see also *Parshuram Dattaram Shamdasani v. The Tata Industrial Bank, Ltd.*, 1924, 26 Bom. L.R. 987 at p. 1007).

These meetings may be **called**:—

- (1) By the **directors** themselves, or
- (2) By the members on a **requisition** according to powers reserved to them under Sec. 78 of the Act, or
- (3) By the **Court** under Sec. 79 (3) either *suo motu* or on application by a director or member.

The exact language of section 78 runs as follows :—

- (1) **Notwithstanding anything in the articles**, the directors of the company which has a share capital shall, on the requisition of the holder of not less than **one-tenth** of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.
- (2) The requisition must **state** the object of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.
- (3) If the directors do not proceed within **twenty-one days** from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called, shall be held within **three months** from the date of the deposit of the requisition.
- (4) Any meeting called under this section by the requisitionists, shall be called in the same manner, as nearly as possible as that in which meetings are to be called by directors.
- (5) Any reasonable **expenses** incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting, shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

The **English Act** contains provisions to the **same effect** in Section 114.

### **Class Meeting and Variation or Modification of Rights**

A class meeting is a meeting of the shareholders of a particular class convened with a view to ascertain their views

or pass a resolution in connection with a question relating to their class. Where a **re-organisation** of share capital has to be made, it is clearly provided by the proviso to sub-section (1) of Sec. 54, that no preference or special privilege attached to or belonging to any class of shares, shall be interfered with except by a resolution passed by a majority in number of shareholders of that class, holding three-fourths of the share capital of that class, and any resolution so passed shall bind all shareholders of that class. Frequently, holders of shares of a particular class are given the privilege by the memorandum or the articles **to appoint separate auditors**, *i.e.*, over and above those appointed by the company in general meeting on behalf of the general body of shareholders, to exercise which right also a class meeting of shareholders may have to be called.

With reference to the **variation or modification of rights** of shareholders it has been specifically provided by Sec. 66A of the Indian Companies (Amendment) Act of 1936 which corresponds with sec. 61 of the English Act of 1929, that if in the case of a company the share capital of which is divided into different classes of shares, provision is made by the **memorandum** or articles for authorising variation of the rights attached to any class of shares in the company subject to the consent of specified proportions of the holders of the issued shares of that class, or the sanction of a resolution passed by a separate meeting of the holders of these shares, and in pursuance of the said provision the rights attached to any such class of shares are any time varied, the holders of not less in the aggregate than **10 per cent (15 per cent under the English Act)** of the issued shares of that class, who did not consent to or vote in favour of the resolution for variation, may **apply to the Court** to have the said variation cancelled. Where any such application is made, the variation shall not have effect unless and until it is confirmed by the Court. An application for this purpose must be made **within 14 days (7 days according to the English Act)** after the date on which the consent was given or the resolution was passed, as the case may be. This application may be made on



behalf of the shareholders entitled to make the application by such one or more other member as they may appoint in writing for the purpose. The Court after hearing the applicant and any other person who applies to the Court to be heard and who is interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would **unfairly prejudice** the shareholders of the class represented by the applicant, disallow the variation. If, on the other hand, the Court is not so satisfied, it would confirm the variation. The decision of the Court on any such application shall be final. The company must within **15 days** after the service of any order made on any such application forward a **copy** of the said order to the **Registrar**. In case of default in complying with this provision, the company and every officer who is knowingly and wilfully in default is liable to a fine not exceeding Rs. 50. The expression "variation" in this section includes "abrogation" and the expression "varied" shall be construed accordingly.

This section was first introduced in the English Companies Act of 1929 on the recommendation of the Greene Commission of 1925-26 because in the opinion of the Commission the modification of rights clause in the articles sometimes operated to cause hardship. In the opinion of the Commission this was particularly the case where, for example, preference shareholders whose rights it was proposed to cut down, held ordinary shares, who would be benefited by the modification and who would use their votes as preference shareholders at the preference shareholders' meeting to secure such benefit to themselves against the interest of the general body of preference shareholders. They thus recommended that the remedy lay in giving the Court in proper cases a power to review the resolution of a class meeting, which in their opinion, would be sufficient to prevent injustice without interfering with the beneficial operation of the modification clauses in the articles.

With respect to the requisition it must be noted that in case of joint members all must sign and the signature of one on behalf

of another will not do (*Patent Woolking Syndicate v. Pearse*, 1906, W. R. 164). The right to join in the requisition is a statutory right which cannot be taken away by the articles, and therefore, according to *Gore-Brown*, p. 353-4 (35 Edn.), those shareholders who have no right to vote given by the articles can also be signatories to this requisition.

### General Rules applying to Meetings

The general rule of law is that to constitute a meeting there must be **at least two** persons present. The same rule applies to joint stock companies and it has been held in *Sharp v. Dawes*, 2 Q. B. D. 26, that a single shareholder cannot constitute a meeting of a company in spite of the fact that he held a large number of proxies. In case of joint stock companies the minimum number of members is fixed at two in case of private and seven in case of public companies, so that one can get at least two to meet, but in cases where a resolution of a majority of shareholders of a class is required, difficulty does arise when all shares of that class are held by one person. It has been held in *East v. Bennett Bros, Ltd.*, 1911, 1 Ch. 163, that there being nothing in the constitution of the company to prevent the whole of the original preference shares being held by one shareholder, the word "meeting" in the memorandum and articles must be taken to have been used not in its strict sense, but as applicable to the case of a single holder and thus a resolution signed by that one shareholder was equivalent to a resolution passed by a meeting of shareholders of that class. A class of shareholders may not be given the right to vote by the articles and in that case, apart from some special provision in the articles, they are not entitled to be summoned to the meeting. (*In re. Mackenzie & Co., Ltd.*, 1916, 2 Ch. D. 450).

With reference to **notice** to call a meeting it was held in *Smith v. Paranga Mines Ltd.*, 1906, 2 Ch. 193, that once the notice is given and a general meeting is properly convened, the directors have no power to postpone the meeting by another notice or by any

other means, unless the articles of association expressly give them such power. The correct course would be to hold the meeting and then get it adjourned in a proper manner. It may be here mentioned that when the articles of association make it compulsory that notice of business at a meeting of a special nature must be given, the notice must give substantial information as to what is proposed to be done otherwise the business done will be invalid (*Pacific Coast Coal Mine, Ltd. v. Arbutnot*, 1917, App. Cas. 607).

In the case of companies, there is always a permanent **chairman** who takes the chair as of right at all meetings. Usually the articles contain a clause as in Table A, to the effect that if at any meeting the chairman is not present "within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman." The duty of the chairman, in conference with the secretary, is to see that the requisite **quorum**, as provided for by the articles, is present, and that all persons present have a right to be there under the regulations of the company. Generally, the regulations provide that a certain number or proportion shall constitute a quorum, but in case the articles are silent the majority must be present. This was laid down in *Attorney General v. Davy*, 2 Atk. 212 by *Lord Hardwick*. According to his Lordship, "It cannot be disputed, that whenever a certain number are incorporated a major part of them may do any corporate act, so if all are summoned and a part appear, a major part of those that appear may do a corporate act." If, however, a resolution is passed at a meeting of directors at which the requisite quorum was not present it has been laid down that the resolution can be confirmed at a subsequent meeting where there is no irregularity, because "It would be a very great hardship indeed upon persons who are members of a company of this kind, if upon such grounds as these, after certain transactions have been acted upon by everybody and believed to be valid, they were afterwards to be invalidated" and therefore it was held that "taking the two meetings together, there was a quorum."

On the question of **quorum** in a Bombay case, *In re Sir Hormusji A. Wadia, Kt*, 23 Bom. L.R. 1104. at a meeting of the Board of Directors, where five directors were present, a resolution was passed allotting a certain number of shares to three of the directors present. The articles laid down a quorum of at least three directors. In voluntary liquidation the liquidator sought to rectify the register on the ground that the allotment was invalid having regard to Sec. 91B. It was held that as the three directors who took the shares were not entitled to vote, there was no quorum and the resolution and the allotment were invalid.

When business is brought forward, it is the **duty of the chairman** to see that every one present is given a fair opportunity to be heard on every question before the meeting, and that none but the mover of the proposition is allowed a second speech, except by way of a brief explanation. The chairman has to put, all motions or resolutions, and amendments correctly brought forward, to vote, and it is the chairman who declares the result. The chairman has the Common Law right to enforce order, and in case a person present behaves in a disorderly manner, the chairman may, after giving him proper a opportunity to correct his conduct, or to withdraw, order the person to be forcibly ejected. In case of ejection, no more force should be used than what is actually necessary. When the chairman finds it impossible to maintain order, he has a right to **adjourn** the meeting. This right to adjourn the meeting particularly depends on the constitution of the company, which has to be carefully consulted, as in the absence of express powers, the chairman cannot adjourn the meeting without the consent of the members present. The chairman decides all points of order raised by any member present and his ruling on points of procedure is final. It was held in *Henderson v. Bank of Australia*, 1889, 40 Ch. D. 170, that when a chairman deliberately rules that a certain amendment cannot be pressed, it would be improper and indecent for any member to proceed to discuss the propriety of the chairman's ruling.

*In National Dwelling Society v. Sykes*, 1894, 3 Ch. D. 159 it was laid down that the duty of the chairman was to preserve order, conduct proceedings regularly, and to take care that the sense of the meeting is properly ascertained with regard to any question before it, but he has no power to stop the meeting or adjourn it unless the articles give him the power. If the articles lay down that the chairman "may" adjourn, as in Table A, he has a discretion and may decline to adjourn even though the majority of shareholders desire the adjournment (*Salisbury Gold Mining Co. v. Hathorn*, 1897, App. Cas. 268). If he wrongfully does so the meeting can go on by appointing another chairman. In *Wall v. Exchange Investment Corporation Ltd.* 1926, 1 Ch. 143, where the articles laid down that no objection should be taken to the validity of any vote except at the meeting at which it was tendered and that every vote whether given in person or proxy, not disallowed at any meeting should be valid for all purposes, it was held that the decision of the chairman who in *bona fide* exercise of the power conferred upon him by the articles, had refused to disallow a vote by proxy to which objections had been taken at the meeting, was final and would not be reviewed by the Court (*Wall v. London and N. A. Cor.*, 1899, 1 Ch. D. 550 was approved).

Generally speaking, the chairman has two rights of vote, *viz.*, that of voting in his capacity as a member according to the voting power reserved to individual members, and in case of a tie, *i.e.*, where the votes are equal on either side, the chairman has what is known as the "**casting vote**" by the use of which he may help the meeting to arrive at a decision if he so desires. This second or casting vote must be expressly given in the articles as the chairman has **no right to a casting vote at Common Law**.

No discussion should be allowed until there is some duly proposed and seconded **motion or proposition** before the meeting, as otherwise the meeting may keep on talking irrelevant matters without arriving at a decision. When a proposition is to be moved

of which due notice has been given, the chairman calls upon the person who has to move it, to move the proposition which has to be seconded by some other member present.

The motion must always be framed in an **affirmative** form, A motion which is not seconded has to be dropped and no note will be taken of it in the minutes. On the other hand, when once a motion is **proposed** and **seconded**, it becomes the property of the meeting, and neither the proposer nor the seconder has the right to withdraw it **without** the unanimous consent of the meeting. The mover of the motion which is not seconded has no right to speak on it.

After a motion is proposed and seconded, an **amendment** of which due notice has been given, may be moved. It has been decided that where no notice as to an amendment on a motion was given, still if the amendment falls within the scope of the original notice, it may be moved (*Torbock v. Lord Westbury*, 1902, 2 Ch. 871). On the same principle, where notice of a meeting for the appointment of other persons as directors was duly given, it was **held** that it was within the rights of the parties to add more names by way of amendments. In a recent Bombay case (*T. H. Vakil v. Bombay Presidency Radio Club*, (1945) 47 Bom. L. R. 428) it was held that as a general rule amendments to a proposition must be germane to its subject-matter, and must **not be**, in substance, a **direct negative** of it. In this case it was held that where at a meeting called for reception and adoption of accounts, a proposition is moved that the report of the managing committee and the audited balance sheet and profit and loss account be "received and adopted," an amendment to it saying that the above be "received but not adopted" and "that a committee be appointed to look into them and to report thereon" is not a direct negation of the proposition and can be properly moved. When more than one amendment of a motion is proposed the **chairman may use his discretion** in arranging the order in which they are to be taken. After dealing with the amendments the original motion may be taken in

hand, *i.e.*, if the amendments are lost, the original motion is put to the meeting, but if the amendment is carried, the original motion, as altered by the amendment, is taken up and put to the meeting as a substantive motion. In case the chairman refuses to put an amendment lawfully moved, the resolution of which it is the amendment, will be invalidated. It has been held that no amendment can be moved after the close of the poll (*R. v. Roberts*, 1868, 3 B. & S. 495).

As to the **right of the shareholder to speak** at a meeting *Pratt J.* in (*Parshuram Dattaram Shamdasani v. The Tata Industrial Bank, Ltd.*, 47 Bom. 915) laid down that "A shareholder is not entitled to speak as much as he pleases but has a right to be heard in reasonable terms for a reasonable time" (See also *Wall v. London and Northern Assets Corporation*, 1898, 2 Ch. D. 469). The other points of interest laid down in this decision of *Pratt J.* were (1) where the articles lay down that the chairman may adjourn the meeting "with the consent of the meeting" the chairman cannot be compelled to adjourn by the meeting ; (2) irregularities are not a matter for the Court, but for a majority of the company to deal with ; (3) the Court will interfere only if the rights of the shareholders are infringed or if a case of fraud or *ultra vires* action is made out.

It frequently happens that the discussion on any motion, or amendment, drags on, in which case, if the constitution of the company permits, any one present who thinks that the **mind of the meeting**, is made up, and that the motion should now be put to vote without any further waste of time, may do so by proposing to the effect that the "**question be now put**". This is known as **the closure**, familiarly called "**the gag**". If seconded, and allowed by the chairman it should be put it to vote, and if carried, no further discussion on the original proposition, or the amendment on which the closure was proposed, should be allowed. The chairman should not allow the closure if in his opinion, the question has not been sufficiently discussed by all sides in propor-

tion to its importance. At this point it will be interesting to note two other types of closures viz., the "guillotine" or closure by compartments, and the "kangaroo" which are mostly used in the House of Commons to limit debate and accelerate business. In case of the "guillotine" certain periods of time are allotted by resolution to the various portions or stages of a bill before the House, or matter before the meeting. At the end of each period, discussion must close and the portions under discussion be put to vote. The **kangaroo**, as its name implies, refers to cases in which the chairman is empowered to select which amendments shall be discussed, and the debate jumps from one selected amendment to another omitting all intervening ones.

We have already seen elsewhere that every member of a company has a right to be heard for a reasonable time on the question at issue. On this point, it was laid down in *Wall v. London Northern Assets Corporation*, 1898, 2 Ch.D.469 to the effect that at the meeting of a corporation it is not competent to the majority to come determined to vote in a particular way on any question and to refuse to hear any arguments to the contrary; but when the views of the minority have been heard, it is competent to the chairman with the sanction of a vote of a meeting to declare the discussion closed and to put the question to vote.

It may be further added that a company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person, to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents, as if he were an individual shareholder of that other company whose meeting he attends (S 80).

## RESOLUTIONS

The resolutions that can be passed at the meetings held by a joint stock company may be divided under three different headings



*viz.*, (1) Ordinary resolution, (2) Extraordinary resolution and (3) Special resolution.

An **ordinary resolution**, is a resolution passed by a simple majority of such members as are entitled to vote who are present in person or by proxy (where proxies are allowed).

An **extraordinary resolution**, is a resolution which has been passed by a majority of not less than three-fourths of such members as are entitled to vote, and who are present either personally or by proxy (where proxies are allowed), at a general meeting of which due notice, specifying the intention to propose the said resolution as an extraordinary resolution, has been duly given (S. 81).

An extraordinary resolution is necessary in the following cases —

- (1) To remove a director (S. 86 G).
- (2) To wind up a company voluntarily (S. 203 (3))
- (3) To sanction any arrangement between a company and its creditors (S. 215).
- (4) To sanction powers of a liquidator in a voluntary winding up (S. 212 (i)).

A **special resolution**, is a resolution which has been passed in the manner required in the passing of the extraordinary resolution, and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given : provided that if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given. It is not compulsory that a special resolution should be passed exactly in the terms of the notice, but may be amended (*Torbock v. Lord Westbury*, 1902, 2 Ch.D. 871).

A special resolution is necessary .—

- (1) To alter the articles (S. 20 (1)).
- (2) To change the company's name with the sanction of the Central Government (the Board of Trade in **English law** (S. 11 (4)).
- (3) To change the place of the registered office from one province to another with the sanction of the Court (S. 12).
- (4) To alter the objects of the company with the Court's sanction in certain cases (S. 12).
- (5) To reduce or cancel share capital with the Court's confirmation (S. 55).
- (6) To create reserve liability of limited company (S. 69).
- (7) To make the liability of directors unlimited (S. 71(1)).
- (8) To assign the office of a director or manager (S. 83 B).
- (9) To sanction additional remuneration of managing agent (S. 87 C).
- (10) To appoint inspectors to investigate company's affairs (S. 142).
- (11) To procure a winding up by the Court (S. 162).
- (12) To wind up voluntarily (S. 203 (2)).
- (13) To empower the liquidator in voluntary winding up to sell or transfer assets to another company (S. 208 C).
- (14) To substitute memorandum and articles for a deed of settlement (S. 267).

In all these cases where these resolutions are submitted to the meeting, a declaration by the chairman by a show of **hands** to the effect that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of that fact, without any further proof being required as to the number or proportion

of the votes recorded in favour of, or against the resolution (S. 81). If, however, a **poll** is demanded by any five persons present in person or by proxy, or the chairman of the meeting, or any member or members, holding not less than one-tenth of the issued capital which carries voting rights, demand a poll, the chairman may direct the same to be given in accordance with the articles. In case of a private company, however, if not more than seven members are personally present one member, and if more than seven are personally present, two members shall be entitled to demand a poll (S. 79 (1) (c)). This poll may be taken at the same meeting or in any manner as the chairman directs. It is generally taken by a division or by ballot. In computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of association of the company (S. 81).

According to the English Act, S. 117 provides that a poll may be demanded by such number of members not exceeding five, as provided by the articles. If no provision is made in the articles, by three members entitled to vote or by one member or two members so entitled, if that member holds or those two members together hold not less than 15 per cent. of the paid-up share capital of the company.

It may be further added that copies of special and extraordinary resolutions should be **filed** with the Registrar in printed or type-written form within **fifteen days** from the passing of the resolution. Failure to observe this provision makes the company liable to a fine not exceeding Rs. 25, for **every day** during which the default continues.

It was laid down in *Raja Bahadur Shivalal Motilal v. The Bombay Cotton Mfg. Co. Ltd.*, 14 Bom. L. R. 45, that in law neither the warrant of a resolution, nor the defect in the Board of Directors, can affect adversely the right of third parties who have no knowledge of the existence of such infirmities when dealing with the company,

## Votes

The voting power of each member entirely depends upon the **articles** of association of the company, but in the absence of a provision on that point in the articles, every member shall have one vote. In case of joint holders, it is usually provided by the articles that the vote of the senior holder shall be accepted to the exclusion of the vote of the other joint holders, and that for this purpose, seniority has to be determined by the order in which the names stand in the register of members. In case, however, the company's articles specifically provide otherwise, the rules as laid down in the articles must be followed. It is also usual for the articles to provide for the **exclusion** of members whose calls are in arrear from exercising their voting power, and with regard to members of unsound mind provision is also made in almost all articles for voting by the committee in lunacy if one is appointed by the Court. In this case the voting may be in person, or by proxy by the said committee. It may be further added that if any person is improperly excluded from exercising his voting power, that would invalidate the poll (*Reg. v. Lambeth*, 13 Ad. & El. 356). **The right to vote is property** and the courts will intervene to protect a member being deprived of that right (*Pender v. Lushing Bros.*, 1877, 6 Ch. D. 70 at p. 81.)

Although it is not necessary that at the **counting of the poll** there should be scrutineers present of each side, it is desirable to have them. It has been held that in case of more than one resolution this poll should be taken on each separately, because if the votes are taken on a number of resolutions together, such a course would invalidate the said resolution (*Patent Wood Keg Syndicate v. Pearce*, 1906, W. N. 164).

Where shares are sold or mortgaged and have not yet been transferred, the **seller or the mortgagor**, whose name stands on the register, alone can vote, but the said seller or mortgagor can so vote only in the manner **dictated** by the buyer or the mortgagee (*Wise v. Landsell*, 1921, 1 Ch. D. 420).

Where **share warrants** are issued, it is usual to give the holder the power to vote in a manner provided by the articles of association. The usual practice is to call upon these members to deposit beforehand their share-warrants with the company.

### **Proxis**

The word "proxy" means either the **person** appointed in the place of another to represent him, or the **instrument** under which such a person is appointed to act.

There is **no common law right** to vote by proxy but the Indian Companies Act (S. 79) confers the power to vote by proxy on a poll, unless the articles expressly provide to the contrary.

The instrument of proxy must be **stamped** with a two anna stamp in Indian Law and with a penny stamp in English Law. The provisions of the articles must be strictly followed and if so provided, the instrument must be deposited with the company a certain number of hours before the meeting.

The person appointed as a proxy must be **competent** e.g. if the articles provide that only members of the Company may be appointed proxies, that provision should be strictly followed. The person giving the proxy must also be entitled to vote e.g. where a person is disqualified from voting for arrears of calls he cannot appoint a proxy to vote for him.

As an **adjourned meeting** is merely a continuation of the original meeting proxies which are lodged after the date of the original meeting but before the adjourned meeting have been held to be invalid (*MacLaren v. Thomson*, 1917. 2 Ch. 261).

It has been decided in *In re. Kelantan Coco Nut Estates*, 1920, W.N. 274, that a corporate body present at a meeting by a representative appointed under Sec. 68 (our Sec. 80) is "present in person" for the purpose of being counted towards a quorum. On the same principle, if the articles permit, a person who is not a member may be appointed proxy, and there is, according to Buckley (p. 618 Edn. 10) nothing to prevent persons so appointed, voting on a show of

hands. In a Bombay case the articles expressly laid down that "No one was to be appointed a proxy who was not a shareholder in the company." The articles also required the proxy to be lodged at the company's office 24 hours before the meeting "at which the person named in such instrument proposes to vote." A shareholder executed a proxy which was in fact a power of attorney authorising certain persons to vote, and all persons who may, during the continuance of the power be partners in a firm called W, or in absence from Bombay of all the said persons, all persons holding procuration of the said firm. The proxy was subsequently used by M who was then a partner of the firm W, and a shareholder in the company, but he was neither a member of the firm nor a shareholder when the proxy was signed. An objection to the proxy being taken the Privy Council held that although not named in the proxy in the strict literal sense of the word "named" he was sufficiently described in the proxy for all business purposes (*Bombay Burmah Trading Corporation Ltd. v. Dorabji Cursetji Shroff*, 7 Bom. L. R. 99).

### Quorum

The quorum may be described as the **number requisite to form a meeting at which business can be done.** The articles of association of companies usually provide for the number that should form the quorum, but in case they do not, **Table "A"** lays down in the case of a private company two and in the case of any other company five (three under the **English Act**) as the number that must be present at any general meeting to be entitled to transact business.

### The Common Seal

Our Act requires that every limited company shall have its name engraved in legible characters on its seal (S. 73). Section 73 further lays down that the subscribers to the memorandum, together with other persons as may from time to time become members of the company shall, on incorporation, be a body corporate having a perpetual succession and a common seal. This seal is the official

signature of the company and has to be affixed to all **important documents** and particularly to mortgages share certificates, drafts, deeds, debentures, etc.

The usual practice is to affix the seal in the presence of two directors who attest it, and there is also a counter signature of the secretary, though this formality is not in strict law necessary. In case of agreements of daily occurrence and of usual character in the regular course of business a joint stock company may dispense with its common seal and get such a contract signed by its agent on its behalf. This agent may be the secretary, the manager, or the director, or other duly authorised officer of the company. In all other cases the seal must be used. In connection with the seal it has been laid down that any person who has the right of managing the affairs of a trading company is implied to have the authority to affix its seal (*Re Contract Corporation*, 1868, 3 Ch. 105). But if the company allows a dishonest person to remain in custody of the seal it will be prevented from setting up the defence that the affixing of the seal was a forgery (*Merchants of the Staple of England v. Bank of England*, 1887, 21 Q. B. D. 160). Deeds may also be executed on behalf of the company in any place not situate in British India by any person empowered by the company in writing under its common seal (S. 90).

Usually the articles contain special provisions laying down in detail as to how the seal is to be affixed, viz., that there ought to be two directors present when it is affixed, who should sign the document, and that the secretary should countersign. Here those who deal with the company are bound to see that the deed on the face of it accords with the article. In *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, 1895, 1 Ch. D. 629, the principle in this connection was well laid down by *Lord Halsbury*, "Persons dealing with joint stock companies are bound to look at, one may call, the outside position of the company—that is to say. they must see that the acts which the company is purporting to do are acts within the general authority

of the company, and if those public documents which every one has a right to refer to, disclose an infirmity in the action, they take the consequence of dealing with a joint stock company which has apparently exceeded its authority. All the public documents with which an outside person would be acquainted in dealing with the company would only show this that, by some regulations of their own, what *Lord Hatherly* described as their **indoor management**, they were capable if they had thought right of making any quorum they pleased, and an outside person knowing that, and not knowing the internal regulation when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorised to execute an instrument of that description." Whereas in another case where the secretary of a company wrongfully affixed the seal on share certificates and forged the signatures of the directors it was held that the company was not estopped from pleading the forgery (*Ruben v. Great Fingall Consolidated*, 1906, App Cas. 439). Here it was laid down by *Lord Loreburn L. C.* that, "The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management and will not be affected by irregularities of which they had no notice. But this doctrine which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."

It is further provided by the Companies Act, Sec. 91, that a company whose objects require or comprise the transaction of business beyond the limits of British India, may if authorised by its articles, have for use in any territory or district or place not situate in British India, an official seal, which shall be the facsimile of the common seal of the company, with the addition on its face of the name of the territory, district or place where it is to be used. Thus it will be noticed that a separate seal for each territory for each foreign branch may be made out and used by our Indian



companies. It is further laid down that the company may authorise any person situate in a foreign territory concerned, to use that seal on behalf of the company for such time as it likes, and the person or official who affixes such seal should by writing on it under his hand, certify on the document on which he affixes the said seal, the date and place of his affixing it.

### Contracts on behalf of the Company

With regard to this we have already seen the law in brief under the paragraph dealing with the affixing of the seal. Section 88 and 89 of our Act deal with these points fully as follows :—

**S. 88.** *(1) Contractt on behalf of a company, may be made as follows (that is to say) :—*

- (i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.*
- (ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority express or implied, and may in the same manner be varied or discharged.*

*(2) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.*

**S. 89.** *A Bill of Exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the*

*name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.*

It may be further added that the powers of a company to enter into contracts depend entirely on its memorandum and its articles. These powers are also implied in case the nature of the business which the company is formed to carry on as such would bring certain types of contracts within its ordinary scope of business. The same rule would apply in case of Bills of Exchange and promissory notes. The only precaution to be taken is to see that, while signing these documents on behalf of the company, the officer concerned makes it clear that he acts as such officer, and on its behalf, and that he does not sign in his personal capacity, *e. g.*,

For the Bombay Trading Company, Ltd.,

John Roberts,

Secretary,

is the proper form, but in case the signature runs as,

John Roberts,

Secretary, Bombay Trading Co., Ltd.

It will be the signature of John Roberts in person and not of John Roberts signing as an officer and on behalf of the Bombay Trading Company.

## ARBITRATION

A company may refer to arbitration in writing, an existing or future difference between itself and any other company or person in accordance with the Indian Arbitration Act, 1899, and for that purpose may delegate to the arbitrator powers to settle any terms, or to determine any matter capable of being lawfully settled or determined by the company itself, or by its directors, or other managing body. The provision of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all

arbitration between companies and persons in pursuance of the Companies Act (S. 152).

## COMPROMISE AND ARRANGEMENTS

Any company liable to be wound up under the Indian Companies Act of 1913, can also compromise with its creditors or members or any class of them, while it is a going concern as provided by S. 153. This can be done by an **application** in a **summary way** to the Court, presented either by the company itself, or any of its members or creditors, or if the company is being wound up, by the liquidator. The Court may then order a meeting of the company, creditors or members, or any class of them to be called. If at this meeting a majority in number representing **three-fourths in value** of the creditors, or members, or any class of them, present either in person or by proxy agree, and the **Court** consents, the said compromise or arrangement shall be binding on all creditors, members, or any class of them and also on the company,

Any order made under sub-section (2) of Sec. 153 in connection with the compromise with a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members shall have no effect until a certified copy of the order has been **filed** with the Registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made. Any **default** in compliance with this rule of filing the copy would entail a fine not exceeding Rs. 10 for each copy in respect of which the default is made, on the company and every officer of the company who is knowingly and wilfully in default.

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## CHAPTER X.

### THE DIRECTORS

#### Definition

A joint stock company usually carries on business through the medium of 'directors' who control the company's management. The actual management is generally vested in a special officer called the 'manager' and when that officer also happens to be a director, he is known as the 'managing director'. The Indian Companies Act **defines** the director as including "any person occupying the position of a director by whatever name called" (S. 25). Thus, function is everything, name matters nothing (*In re Forest of Dean Coal Mining Company*, 1878, 10. Ch. D. 450).

#### Their appointment and qualification

According to the Indian Companies (Amendment) Act of 1936, every **public company** registered after the commencement of that Act, is compelled to have at least **three** directors. In English law a public company, registered after the Companies Act of 1929 came in force, must have at least **two** directors. A private company of course need not have directors at all if it so chooses. In such cases all the members of a private company may carry on the business, or there may be what is commonly called a "Council". It is, however, the practice of all joint stock companies whether in India, or in England, public or private, to appoint a Board made up of men of position and experience to act as directors. The first directors are generally appointed by the promoters and it is not unusual to find a promoter appointing himself as a director. Usually the current practice is to name the the original directors in the **articles**. This has now become universal because it is so convenient and saves an amount of unnecessary trouble and expense. It should be followed in case of every modern company. If that is not done, the

first members or **subscribers** to the memorandum of association act as directors until a meeting of shareholders appoints directors.

The subsequent directors are appointed by members in **general meeting**, but in case any **casual vacancy** occurs during the interval, it shall be filled in by the Board of Directors itself. There is no objection, however, for articles of association to provide that the signatories to the memorandum shall appoint the first directors, or it may be arranged by the articles that a meeting of subscribers may appoint directors by a majority, in which case this meeting should be held subsequent to the registration of the company (*London and Southern Counties Land Company*, 1886, 31 Ch. D. 223).

Where articles laid down that the directors might appoint additional directors up to the prescribed maximum, it was held that this express power vested in the board, excluded any implied concurrent power to the same effect in the company, and the Board had the sole power of appointing additional directors (*Blair Open Hearth F. Co., v. Reigart*, 103 L.T. 665). A limited company may be appointed as a director of another company (*Bulawayo Market and Offices Co.*, 1907, 2 Ch. 458).

It may be noted that according to Sec. 83B (2) of the Indian Companies (Amendment) Act of 1936 *notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation. This provision shall not apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation, falls below the two-thirds proportion mentioned in this section.*

The object of this addition was to provide for not more than one-third of the total number of directors being nominated or appo-

inted by managing agents. As it was thought doubtful later whether this Sec. 83B (2) would achieve that objective, a further section was added, *viz.*, Sec. 87 (i) which clearly lays down that *notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agents shall not exceed in number one-third of the whole number of directors.*

There is, of course, **no such provision** for compulsory retirement of directors by rotation in the English Companies Act, but usually the articles of these companies voluntarily provide for one-third or thereabout to retire by rotation every year.

It is further laid down that a person shall not be **capable** of being appointed a director of a company by the articles, and shall not be named as a director, or proposed director of a company in the prospectus issued by or on behalf of the company, unless the said director has, before the registration of the articles, or publication of the prospectus, or filing of a statement in lieu of prospectus, (1) signed and filed with the registrar a consent in writing to act as such a director; and (2) except in case of a company limited by guarantee not having a share capital, has either signed the memorandum, or signed and filed with the registrar a contract in writing to take shares and pay for them for not less than the amount of his qualification, **if such a qualification is provided for by the articles.** The director may provide for his qualification share by a joint holding (*Grundy v. Briggs*, 1910, 1 Ch. 444). These qualification shares may either be acquired from the company or purchased from outside (*Carling's Case*, 1876, 1 Ch. D. 115).

It is also laid down that a director cannot accept his qualification shares as a present from the promoters, or vendors, and in case he does so, he shall be liable to make good the whole amount in respect of such shares as a contributory, in case liquidation intervenes (*Hay's case*, 1875, Ch.D. 604). It fact this conduct amounts to a gross breach of trust as here the director is virtually

speaking accepting a retaining fee from the promoter or vendor and is liable to be sued by the company for damages. The articles frequently lay down that qualification shares be held by the directors in their own right, which will not mean that they must be beneficially entitled to them (*Pulbrook v. Richmond Consolidated Mining Co.*, 1878, 9 Ch. D. 610). All that is required is that they should be so held as to be capable of being safely dealt with as far as the company is concerned (*Banbridge v. Smith*, 1889, 41 Ch. D. 462). Again much depends upon the language of the articles reserving such a provision, because in case the articles make the acquisition of qualification shares a condition precedent to a director taking up his appointment, then the director cannot act unless he acquires the said shares first. It is further laid down that in case a director has acted without the requisite qualification, or in case the said qualification or his appointment itself was found to be defective at a later stage, that will not of itself invalidate his acts as a director but this rule will not apply to acts done after it has been shown that the appointment of the said director was invalid (S. 86). Clauses in the articles on the same footing are also common, the objects of which being to make acts of *de facto* directors as valid and binding as those of *de jure* directors. It may be further added that in case a director ceases at any time to hold his qualification, his office shall be vacated within two months, or any shorter time as may be fixed by the articles of his ceasing to hold such a qualification.

According to old decisions if a person accepted an appointment and acted as a director with the knowledge that according to the articles a specified share qualification was compulsory, that in itself was held to be an agreement to obtain the necessary shares within a reasonable time if he did not possess them, with the result that in case he failed to obtain the necessary qualification within a reasonable time, the company could place him on the register in respect of that number of shares. Now that Sec. 85 prescribes the consequences of a director failing to comply with the requirements

of acquiring the said qualification shares, this old law according to the best authorities has been superseded. In *Spencer v. Kennedy* 1926, 1 Ch. D. 125, where the articles specially provided the qualification of a director as "the holding of at least one share" and another article empowered the directors to appoint any other "qualified person" either to fill a casual vacancy or as an addition to the Board, and at one of its meetings appointed two men as directors whose transfers had been accepted but who had not been placed on the register of members, it was held that although these men had acquired an absolute right to be registered, they were not "qualified persons" before actual registration and that their registration as directors was invalid.

In *Brown and Green, Ltd. v. Hays*, 36 T. L. R. 330, it was decided that salary paid to an unqualified managing director can be recovered by the company. With regard to the **acts of an irregularly constituted Board** it was held in *Changamal v. The Provincial Bank, Ltd.*, 26 All. 412, that an allotment of shares by an irregularly constituted Board is *prima facie* invalid. **But** this defect may sometimes be cured if the articles of association of the company provide for the validation of an act done by a *de facto* director in a *bona fide* manner. The other principle laid down in the same case is that "if there is no notice of allotment of shares in a company given to an applicant before the company goes into liquidation, such applicant is not liable to be placed on the list of contributories."

As between the company and the third person having no notice to the contrary the directors *de facto* are directors *de jure* (*The Hope Mills, Ltd. v. Sir Cawasji J. Readymoney*, 13 Bom. L.R. 162).

### Assignment of Office of Directors

The practice of assigning office by directors under powers given to them in the **articles** of association became most frequent in England, with the result that the matter came up before the



Greene Commission of 1925-26. The Commission in its report said that "it may be questioned whether such a provision is lawful at any rate in the case of directors, but in any case we consider that the practice is a most undesirable one and that any such assignment should be prohibited unless it is sanctioned by the company." It further added that "when such a provision is in force the company is deprived of all effective control over its directors, and the holder of office is in a position to force upon the company for his own profit any person, whether suitable or not who is willing to pay a price." Accordingly section 151 of the English Companies Act of 1929 renders the assignment of the Office of directors as such to another person of no effect unless and until it is approved by a **special resolution** of the company. This provision has been followed in our Indian Companies (Amendment) Act of 1936 which lays down that *if in the case of any company a provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of a company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall notwithstanding anything to the contrary contained in the said provision be of no effect unless and until it is approved by a special resolution of the company* (S. 86B.)

### Alternate or Substitute Directors

However, the exercise by a director of a power in the **articles** to appoint an **alternate** or substitute director to act for him during an **absence of not less than three months** from the district in which meetings of the directors are ordinarily held, if done with the **approval of the Board** of Directors, shall not be deemed to be an assignment of office within the meaning of this section.

Of course any such alternate or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which the meetings of the directors are ordinarily held. It will thus be seen that temporary appointments of alternate or substitute

directors do not constitute an assignment of office within the meaning of this section, when made with the approval of the Board of Directors.

### **Debenture Directors**

There are also cases where debenture holders or some other outside body are empowered to attend or nominate directors, and in such cases the nomination of such body will in itself be sufficient and no further act on the part of the company will be necessary (*British Murac Syndicate v. Alpertou Rubber Co.*, 1915, 2 Ch. 136). If, however, the arrangement is that this outside body is to nominate and the company is to appoint them of course the appointment by the company would be necessary (*Plantations Trust v. Bula (Sumatra) Rubber Lands*, 1916, 85 L. J. Ch. 801).

### **Directors Qualification**

It is further laid down that a person shall not be capable of being appointed a director of a company by the articles, and shall not be named as a director, or proposed director of a company in the prospectus issued by or on behalf of the company, unless the said director has before the registration of the articles, or publication of the prospectus, or filing of a statement in lieu of prospectus, (1) signed and filed with the registrar a consent in writing to act as such a director, and (2) except in case of a company limited by guarantee not having a share capital, has either signed the memorandum and signed and filed with the registrar a contract in writing to take shares and pay for them for not less than the amount of his qualification if such a qualification is provided for by the articles. This of course does not apply to a private limited company.

From this it should not be thought that it is compulsory under the Companies Act for a director to hold qualification shares. All that the law says is that where the **articles** require the director to hold qualification shares he must do so, and the

construction and wording of the article concerned will decide the question as to when and how he should hold them (*In re Peoples Bank of Northern India, Ltd.* 1932, I. R. Lah. 685). If, however, he does not acquire these shares within **two months, or any shorter time** that may be provided for in the articles after his appointment, his office will be vacated, and in case any unqualified person acts as the director of the company after the expiry of this period reserved for him to acquire qualification shares, he shall be liable to a **fine** not exceeding Rs. 50 for every day after the expiration of the said period and up to the last date on which he is proved to have acted as a director (S- 85).

It should be further noted that a director does not necessarily lose his qualification by mortgaging his shares by a blank transfer (*Cumming v. Prescott Y. & C. (Ex.)*, 488). A joint holding may also qualify a director (*Grundy v. Briggs*, 1910, 1 Ch. 444). Even in cases where the articles lay down that the director should hold his qualification shares "in his own right" it has been held that holding in the capacity of a trustee will do (*Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610). This construction has, however, of late been restricted in *Boschoeh Proprietary Co. v. Fuke*, 1906, 1 Ch. 148, where a liquidator holding shares as such was declared as not qualified to be a director. The mere fact that the shares are held by the director as a trustee for another company. does not render him liable to account for that fee to the said company (*Re Dover Coalfields Extension, Ltd.*, 1908, 1 Ch. 65.)

### Vacation of Office of Director

Under the old Act there was no provision within the body of the Act as to the circumstances under which the directors vacated their office *ipso facto*, though articles of most companies provided for it. It was, however, thought that a specific provision in the Act was necessary because if a company omitted this clause from the articles there was nothing to force even a bankrupt director to vacate his office. Thus section 86I now specifically lays down that the office of a director shall be vacated if :—

- (a) *he fails to obtain within the time specified in sub-section (1) of Sec. 84, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or*
- (b) *he is found to be of unsound mind by a Court of competent jurisdiction, or*
- (c) *he is adjudged an insolvent, or*
- (d) *he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or*
- (e) *he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or*
- (f) *he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is the longer, without leave of absence from the board of directors, or*
- (g) *he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of Sec. 86D, or*
- (h) *he acts in contravention of Sec. 86F.*

The above grounds are the grounds specifically laid down by the section but additional grounds may be included in the articles.

It may be added that in the English Act there is **no section** which provides **for compulsory vacation**, and what happens in

actual practice is that **articles** of association of joint stock companies usually provide for vacation of office under circumstances similar to those dealt with by our Indian Section 86 (I) as given above.

### **Bankrupt Directors, Managers & Managing Agents**

It is now laid down specifically by Sec. 86A in addition to the provision of **disqualification** as provided for by Sec. 86I (c) that in case an **undischarged insolvent** acts as a director or managing agent or manager of any company he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding Rs. 1,000 or to both. This section covers companies incorporated both within British India and outside British India.

It may be added that this section follows a **similar section**, viz., Sec. 142 of the **English Act** which was enacted on the recommendation of the Greene Commission. The Greene Commission stated to the effect that they had come across many cases where bankrupts who had not obtained their discharge had been able, by using the machinery of the Companies Act, to continue trading under the guise of a limited company with results often disastrous to those who had given credit to the company.

### **Removal of Directors**

Unless the articles gave power to the company in general meeting to remove directors, it was not within the power of shareholders under the old Act to do so. This is the position of **English Law** at present even under the Act of 1929.

The Indian Companies (Amendment) Act of 1936, however, provides that the company may by **extraordinary resolution** remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed

*shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed cannot be re-appointed a director by the Board of Directors (S. 86G).* This section applies, as will be noticed, only **to those directors whose period of office is liable to determination at any time by retirement of directors in rotation**, by which saving clause the section attempts to exclude ex-officio directors nominated by the managing agents as well as debenture directors and special directors nominated by holders of large blocks of shares, particularly in cases where public bodies or Indian States frequently invest largely in companies by purchasing shares or debentures, and make it a condition that in consideration of so doing, they shall have the power to nominate one or more directors of their choice, from falling under the operation of this section.

It may be further added that this section does not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act of 1936 (S. 86G (2)).

Where in a recent case, the articles of association laid down to the effect that the one third of the first directors to retire, unless the directors agree among themselves, shall be determined by ballot, it was held by the Appeal Court that the words "by ballot" meant by lot and that the words "the whole number of directors" in the article did not include additional directors who by another article only held office until the ordinary general meeting (*Eyre v. Milton Proprietary Ltd.*, 1936, 1 Ch. 244).

### **Register Of Directors, Managers & Managing Agents**

Under Sec. 87 of the Indian Companies (Amendment) Act of 1936 a company is required to keep at its registered office not only a register of its **directors**, as in the case of the old Act, but also that of **managers and managing agents** in which with respect to each of these officers various particulars have to be recorded.

In case of an **individual** director, manager or managing agent, his present name in full, any former name or surname in full, his usual residential address, his nationality and if that nationality is not the nationality of origin, his nationality of origin and his business, occupation if any, and if he holds any other directorship or directorships, particulars of such directorship or directorships have to be stated.

Where any of these offices are held by a **corporation**, the register must state its corporate name and registered or principal office and the full name, address and nationality of each of its directors.

In case, however, a **firm** holds any of these offices, the register must include the full name, address and nationality of each partner and the date on which each became a partner.

The company must within **14 days** from the appointment of the first directors of the company, and within the same period of the happening of a change in such appointment, send to the registrar a return. This register must be kept open during business hours to the **inspection** of any member of the company without charge, and of any other person on payment of rupee one or such less sum as the company may impose upon each inspection, subject of course to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection. In case any default is made in this connection or if inspection is refused, the company and every officer of the company knowingly and wilfully in default is liable to a fine of rupees fifty and the Court may in case of such refusal on application made to it by the person concerned by order direct an immediate inspection of the register.

In **English Law** also a company has to keep a register of its directors containing their names, addresses, original nationality and any change therein. Copies of such register have to be sent to the Register and at the same time changes among the directors have

to be notified to that officer from time to time. In India, however, as we have managing agents, they have to be provided for specifically with a view to meet the requirements of Indian conditions.

### 1 Their Position

The position of the directors is partly that of **agents** and partly that of **trustees**. They are **special agents** in as much as they can exercise only those powers which are given to them by the company's constitution, *viz.*, the articles and the memorandum. If, therefore, they exceed these powers, the act so done will be considered *ultra vires* the directors, but if such act is within the powers of the company itself *i.e.*, *intra vires the company*, the company may ratify it, otherwise the directors would be personally liable on such *ultra vires* contract. This rule is applicable with certain limitations, for it has been held in various cases that, in case the directors infringe some regulations of the company, and exceed their authority in that respect, but if the transactions are within the scope of the company's authority, the company is bound; as in the case of *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, 1895, 1 Ch. D. 629, where the directors at their meeting where only two of them were present, (whereas the company's regulations fixed three as the quorum) authorised the secretary to affix the company's seal to a mortgage, it was held that notwithstanding this irregularity the execution of the deed was valid because the mortgagees had no notice of the said irregularity. The same principle was laid down in *Biggerstaff v. Rowatt's Wharf Ltd.*, 1896, 2 Ch. D. 93, where *Kay L. J.*, said that 'it would be extraordinary if a person dealing *bona fide* with the managing director of the company were bound to enquire whether the powers which the articles authorised the directors to give him had been formally delegated to him.' In this case the said managing director had acted within the scope of his apparent authority as a managing director, and thus, the person who dealt with him *bona fide* was protected.



Some judges have compared the position of directors with that of managing partners; but here it may be noticed that the **directors can act only as a body** and that a single director will have no authority to bind the company, unless such powers are specifically delegated to him by the Board made up of these directors according to the special regulations of the company. It may be further added, that if an *ultra vires* act done by the directors is acquiesced in by all the shareholders the said act shall be valid. Here, it is insisted that acquiescence of every shareholder is necessary. Of course, if the acts are *ultra vires* the company, none of the above rules shall apply because such acts can never bind the company and cannot be valid. The ordinary rule of law will apply in a case of **fraud**, viz., that a company will not be bound by a fraudulent agreement entered into by directors on its behalf, as directors are not agents of the company or shareholders to commit a fraud.

### Directors as Trustees

The next position of the directors is a **resemblance** to that of a trustee in connection with the assets of the company which come into their hands (*In re Lands Allotment Co.*, 1894, 1 Ch. D. 631). According to Lord Hardwick (*Charitable Corporation v. Sutton*, 1742, 2 Atk. 400) directors of a chartered corporation, who had misapplied its funds and committed breaches of its bye-laws, were liable as trustees for "breach of trust". Lord Selbourne in *G. E. Rail Co v. Turner*, 1872, 8 Ch. App. 149 laid down that "the directors are the mere trustees or agents of the company—trustees of the company's money and property; agents in the transactions which they enter into on behalf of the company." The same principle is laid down in *Alexander v. Automatic Telephone Co.*, 1900, 2 Ch. D. 56, where Lindley, M. R., laid down that the Court of Chancery has always exacted from directors the observance of **good faith** towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim '*Caveat emptor*' has no application to such cases, and directors who so use

their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, **cannot retain those benefits** and must account for them to the company, so that all the shareholders may participate in them. It is, however, further held in another case that the relation of trusteeship exists as between the company and the directors, but not as between the directors and individual shareholders (*Perceval v. Wright*, 1902 2 Ch. 421).

Section 91A of the Indian Companies Act requires every director directly or indirectly concerned or interested in any contract, or arrangement, entered into by, or on behalf of the company, **to disclose the nature of his interest**, if any, at the meeting of directors at which the contract or arrangement was determined if his interest then exists, and in case the director had no interest at such a time, but acquires an interest later on, he is required to disclose such interest at the first meeting held immediately after such interest is acquired. If, however, the directors have a notice to the effect that this particular director is a member of a firm or company, with whom the said transaction is entered into, then the said notice shall be sufficient. Any contravention of the requirement of this section makes the director liable to a **fine** not exceeding one thousand rupees. Section 91A now under our Amending Act of 1936 further lays down to the effect that a **register** shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which this section applies, which register shall be kept open to inspection by any member of the company at the registered office of the company during business hours. This is peculiarly **Indian Law** and this addition in the section has been made with a view to see that some provision be made to ensure that shareholders may obtain information about contracts in which directors of the company are interested, and the register is now made compulsory with a view to supply this information ~ The director is also prevented by Sec. 91 B from voting on such a contract at the meeting when it is considered by his brother directors, and in case he does so, his vote will not be counted, nor shall his presence count for the

purpose of forming a quorum at the time of any such vote, but he is liable to be fined to the extent of one thousand rupees for contravention of this section. This rule under Sec. 91 B **does not apply to a private company.**

Sections 91A & B, it will be noticed, made it compulsory that the interest of a director should be disclosed by him and that he should refrain from voting on a proposition when a contract in which he has an interest is being considered, except where "it is a contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company." These sections do not, however, in any way abolish the well established rule of law that unless authorised by the articles, the directors cannot enter into contracts with their companies, because "A director of a company is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors, as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company provided such affirmation or adoption is not brought about by unfair or improper means and is not illegal or fraudulent or oppressive towards those shareholders who oppose it" (*North West Transportation Co. v. Beatty*, 1887, 12 App. Cas. 589 at p.593). The underlying idea is to preclude a person from placing himself in a position in which his duty and interest are in conflict (*Parker v. McKenna*, 10 Ch. 96-118).

Modern articles generally contain clauses empowering directors to enter into contracts with their company after making due disclosure to their fellow directors, which of course, is quite legal and proper. In the absence of such a clause in the articles the director at fault would have to account to the company for all the profits made by him on such a contract, unless the contract is ratified by the company (*Grant v. U. K. Switchback Ry. Co.*, 40 Ch. D. 135).

In such a case or in any other case of **secret profit**, however, the company itself is the proper person to sue. Neither the individual shareholder nor the purchasing company can sue (*Clarkson v. Davies*, 1923, A.C. 100). It must be noted, however, that where the articles permit the directors to contract as above after disclosing their interest, the quorum at the board meeting should be counted by excluding the interested director (*Greymouth Point Elizabeth Ry. & Coal Co.*, 1904, 1 Ch. 32). If however, the articles do not contain the power authorising a director to enter into contracts with the company, it has been held that even the rest of the Board, *i.e.*, those who are not interested, cannot vote and give effect to such a contract, as the company has the right to get an unbiased opinion of the whole Board (*Benson v. Heathorn*, 1842, 1 Y & C. C. at p. 341-42) also (*Imperial Mercantile Credit Assn. v. Coleman*, 6 Ch. App. 558).

The directors are no doubt in some sense trustees of the company, and are to be held liable as such where the nature of a transaction has appeared to the Court to be such as to make the directors so liable. They are such trustees and agents for the shareholders of the power committed to them and it is on this principle that directors are not allowed to vote in a matter which is the subject of discussion at a Board meeting in which they are personally interested, *i.e.*, where their interest conflicts with their duties (*Ramaswami Iyer v. The Madras T. P. & P. Co.*, 28 Mad. 991). It is, however, held that they are not trustees, and liable as such in every case, simply because they are acting as directors of the company, and the **distinction between the two positions**, *viz.*, that of agents and trustees respectively, which they are from time to time called upon to fill, is fully dealt with by *James L. J.*, in *Smith v. Anderson*, 1880, 15 Ch. D. 247. The principles here laid down are important inasmuch as they illustrate the difference or distinction between the position of trustee under the ordinary law of trust, and that of the director of a company as to his liability or responsibility with regard to the company's funds with which he is dealing.

Here, his Lordship, in the course of his judgment said, "To my mind the distinction between the director and trustee is an essential distinction founded on the special nature of things. A trustee is a man who is the owner and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director, and also be a trustee having property, but that is a rare, exceptional and casual circumstance. The office of a director is that of a paid servant of the company. The director never enters into a contract for himself, but he enters into contracts for his principal, *i.e.* for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority." The position in short as occupied by directors is a **fiduciary position**, on the same footing more or less as that between a principal and agent (*Jacobus Marler Estates v. Marler*, 85 L.J.P.C. 167). It will thus be seen that the directors are in the position of trustees inasmuch the company's assets and properties are entrusted to them, and therefore, if they misappropriated the same for their own use, or did some other similar wrong they would be guilty of a **breach of trust**. On the other hand the contracts and agreements they enter into on behalf of the company, while acting as its servants and agents, are entered into in their capacity of agents. Again, it has been held that the funds of a company are by statute made applicable to the purposes specified and thus they are impressed with a quality of trust-

The fiduciary position of directors has, of course, its limitations. It does not, for example, apply to directors as shareholders in their own personal rights. There is nothing to prevent them for example from purchasing shares from a deceased shareholder's executors on their own account, if they do so *bona fide* and refrain from taking a wrong advantage of their position. The directors, it must be remembered, are **not trustees for individual shareholders**, and may purchase their shares without disclosing

pending negotiations for the sale of the company's undertaking (*Percival V. Wright*, 1902, 2 Ch. 421; *Allen V. Hyatt*, 1914, 30 T.L.R. 444).

### Directors as Agents

As agents of the company the directors manage and direct the business of the company according to the powers given to them by the memorandum and the articles of association of the company. Their responsibility to the company in their capacity as agents is synonymous with that of an agent to his principal. As long as they act within their powers, and sign contracts clearly on behalf of the company, they will not be responsible, as long as they act honestly, and use their discretion in what they honestly believe to be the interests of the company. They will therefore not be liable for a simple error of judgment, as opposed to gross negligence. While **signing on behalf of the company** they must make the fact clear that they are simply acting as agents.

According to Palmer (Company Law, 12th Edn.), "(1) Where the directors make a contract in the name of or purporting to bind the company, it is the company, the principal, which is liable on it, not the directors; they are not personally liable unless it appears that they undertook personal liability (*Lindus v. Melrosa*, 3 H & N 177; *Mc Collin v. Gilpin*, 5 Q. B. D. 390), e. g., by contracting in their own name, or by contracting for the company without using the word "limited" as part of the name. (2) When directors contract in their own names, but really on behalf of the company, the other party to the contract can, generally, on discerning that the company is the real principal, sue the company on the contract. (3) Where the directors enter into a contract which is within the power of the company but is beyond the powers of the directors, the company, like any other principal, can ratify the contract (*Grant v. United Kingdom Switchback Rail Co.*, 4 Ch. D. 135)".

From this it will be seen that the ordinary principles of the law of agency apply to the case of directors when they contract on

behalf of the company. In the words of Lord Cairn (*Ferguson v. Wilson*, L. R. 2Ch. App. 77). "Whenever an agent is liable the directors would be liable. Where the liability would attach to the principal and the principal only, the liability is the liability of the company." We have already dealt with this point as to the form in which the secretary or manager should sign. In one case where the document began with the words "We, the directors of A. B. C. Co. Limited hereby agree," it was held that the directors were personally liable. This was so because here directors signed in a form which made the signature their personal signature and the contract a personal contract leaving the creditor the option to sue either the company or the directors personally.

With regard to the **actual contracts** entered into either by directors, or any other agents or managers of the company, it may be added that section 88 of our Act lays down that, in case the contract made on behalf of the company is of such a nature, that according to the ordinary law of contracts it must be in writing, then it shall be also in writing, whereas in case of an agreement if made between private individuals which is valid when made by parol only, the same may be made by the company or its agents on its behalf orally. Of course all contracts entered into on behalf of the company should be such as the company is by its constitution empowered to enter into. The directors and other agents of the company may, if so empowered, also draw, accept or endorse, a bill of exchange, *hundi* or promissory note on behalf of the company (S.89). In this connection it may be added that besides the powers given to directors and agents under the articles and the memorandum, the company may under its own seal empower any other person to exercise any specific power by a writing under its common seal (S. 90).

In the well-known case, *In re City Equitable Fire Insurance Co., Ltd.*, 1925, 1 Ch. D 407, *Romer J.* summarised the duties of the directors. His Lordship laid down that (1) the manner in which the work of a company is to be distributed between the Board of Directors, and the staff is a business matter to be

decided on business lines. (2) In discharging his duties a director must act honestly and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf. But he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his skill and experience. (3) He is not liable for mere errors of judgment. (4) His duties are of an intermittent nature to be performed at periodical board meetings and he is not bound to give continuous attention. (5) Though not bound to attend all such meetings he ought to attend them when reasonably able to do so. (6) In regard to all such duties which may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official. (7) It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except so far as the articles of association justify him in delegating that duty to others. (8) The director in recommending a dividend and presenting the annual report and the balance sheet, should not merely be guided by the assurance of the chairman, however apparently distinguished and honourable, nor with the expression of belief of the auditors, but should himself have a detailed list of the company's assets and liabilities prepared for his own use. (9) It is the duty of the director of a big insurance company personally to supervise the safe custody of the company's securities.

It may be added here that in this *City Equitable* case the articles of association of the City Equitable Fire Insurance Co., Limited, contained a clause which is commonly known as the "**Indemnity clause**" under which the directors of the company as well as various officers were declared not to be answerable for acts, neglects or defects of the other or others of them or for any bankers or other persons with whom any money or effects belonging to the company were lodged for safe custody, or for insufficiency or deficiency of any security upon which any moneys of the company were invested, or for any other loss, misfortune or damage unless



the same should happen by or through their own wilful neglect or default respectively. The *City Equitable* case decided that such or similar indemnity clauses were valid and binding. However on the recommendation of the Greene Commission the English Act of 1929, Sec. 152 declares such clauses to be void. Our Indian Companies (Amendment) Act of 1936 has followed suit and has declared similar indemnity clauses to be void under Sec. 86C. The actual wording of the section is as follows:—

*Sec. 86C. Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void:—*

*Provided that—*

- (a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and*
- (b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and*
- (c) notwithstanding anything in this section, a company may, in pursuance of any provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under Sec. 281 of this Act in which relief is granted to him by the Court.*

### **Loans to Directors**

The practice of taking loans from companies of which they were directors became a scandal in this country with the result that the Bombay Shareholders' Association and other public bodies protested against it. As a result, Sec. 86D (i) was introduced into our Act by the **Indian Companies (Amendment) Act of 1936** which expressly **forbids** loans of any kind to a director **other than** the director of a **banking** company or that of a **private** company. It is thus laid down expressly that no company shall make any loan or guarantee any loan made to a company or to a firm of which such a director is a partner or to a private company of which such director, is a member or director.

In addition, Sec. 86D (2) lays down that if the provision of the above sub-section is contravened, any director who is a party to such contravention shall be punishable with fine which may extend to rupees five hundred and if default is made in repayment of the loan or in discharging the guarantee he shall be liable jointly and severally for the amount unpaid.

The **English Companies Act of 1929** contains **no provision** forbidding loans to directors **but** contains a section (128 (1)) under which the **accounts** to be laid before the company in general meeting must contain **particulars** showing the amount of loans made or repaid to a director or officer of the company during the period to which the accounts relate as well as those made before such period and outstanding at the expiration thereof.

### **Office of Profit held by Directors**

It is **now** laid down by Sec. 86E that no director or firm of which such director is a partner or private company of which such director is a director shall, without the **consent of the company in general meeting**, hold any office of profit under the company **except** that of a **managing director or manager or a legal or technical adviser or a banker**. This section shall not apply to

a director appointed before the commencement of the Indian Companies (Amendment) Act of 1936 in respect of any office for profit under the company held by him before the commencement of this Act. For the purpose of this section, however, the office of managing agent is not to be deemed to be an office of profit under the company.

### **Restriction on Powers of Sale and Remission of Debt by Directors**

The new Indian Companies (Amendment) Act of 1936 now lays down that directors of a public company or of a subsidiary company of a public company shall not, except with the **consent** of the company concerned in **general meeting**, sell or dispose of the undertaking of the company or remit any debt due by a director (S. 86H).

This was done because a constant practice of disposing of the undertaking of the company was noticed among Indian companies in which cases the shareholders were never consulted and large amounts of debts due by directors were remitted by the Board without consulting the company in general meeting.

### **Manager or Other Agent.**

There is one section of the Act, *viz.*, Sec. 91D which may be usefully considered here. This section lays down that every **manager or other agent** of a company other than a private company, *not being the subsidiary company of a public company* who enters into a contract for or on behalf of a company, in which contract the company is an undisclosed principal, shall make a **memorandum in writing**, stating the terms of it and the person with whom it is made. This memorandum he must forthwith deliver to the company *and send copies to the directors*, and such memorandum shall be filed in the office of the company and laid before the next meeting of its directors. In case of default, the company shall have the option to declare this contract as void and

the manager or other agent is liable to a fine not exceeding two hundred rupees. This section is **peculiar to our Indian Act** and would apply to all agents, including managing agents and brokers, who should take care to see that the section is strictly complied with in order to save themselves from the penalty.

This section was introduced because the managing agents are frequently dealers in commodities and other articles which the company requires for its own use. For illustration, supposing a firm of cotton merchants are managing agents of a cotton textile mill and purchase cotton both for their own business as well as for the mill. The idea is that the contract made for the mill must be immediately communicated to the directors, because the complaints were that frequently agents bought cotton on their own account and transferred the contract to the companies under their management if the prices fell thereafter, whereas they claimed the contract as their own if the prices rose. This is of course a section peculiar to our Indian Act.

### **Direction of Business**

The directors direct the business of the company in accordance with their powers in the **articles** and the **memorandum** of association of the company. The articles usually provide for a **quorum**, in which case the requisite number must be present, and in such a case the majority may act. If the articles on the other hand do not provide for a quorum, the majority of the Board must be present before they can act. If, however, the articles provide that in case of vacancies the continuing director may act, that will mean that even a number smaller than the one prescribed can effectively exercise the powers of the Board. The Indian law lays down that there shall be at least three directors in case of a public company, but there is no limit as to the maximum, which is evidently left to the option of the company to fix by its regulations. Once a number is fixed, it cannot be reduced without following the proper method of altering the regulation concerned.

Every director is entitled to a **notice** as to the date of, and business to be done at, every meeting, and unless he happens to be abroad or out of reach, the failure to give such a notice may invalidate the business transacted at such a meeting. Here also it may be noted that the rule in *Gibson v. Barton*, 1875, 10 Q. B. 329 at p. 339 will apply that a meeting is to be called at the orders of the directors and not of the secretary. This applies to all meetings including meetings to fill up vacancies and the notice in such a case, should also state the names of persons who are candidates for the place vacated. It is sometimes provided by the articles that a **circular** signed by all the directors may carry the force of a resolution, in which case the said provision will be legal. We have seen that where a quorum is provided for, the number constituting the quorum should be holding the necessary qualification. When a minimum number is fixed, and the number falls below the minimum the remaining directors *prima facie* cannot act (*Alma Spinning Co.*, 16 Ch. D. 681). Nevertheless, their acts may be valid in favour of a person who has no notice of the irregularity (*British Asbestos Co.*, 1903, 2 Ch. 439). It is the usual practice of the Board of Directors to delegate their powers to a **committee** appointed from among themselves, or to managers or other officers. It has been decided, however, in *re Leeds Banking Co.*, *Howard's Case*, 1866, 1 Ch. D. 561, where the Board of Directors resolved that some shares which were remaining undisposed of may be allotted at their discretion by two of the directors and the manager, and subsequently the said directors and the manager exercised their right, that this delegation of powers by the Board was *ultra vires* and therefore the allotment itself was bad. When, however, the articles specifically delegate that power, the Board of Directors can, even by a quorum of one, delegate the powers to a committee of one (*Umney v. Fireproof Doors Ltd.*, 1916, 2 Ch. D. 142). The point involved is that in the usual course of the exercise of this power of delegation the **Board must act as a body**, and that a single director as a director has no authority to act in a particular way and bind the company.

The directors may, when so authorised, appoint one or more of their members as managing director, or managing directors, and once this appointment is made under powers duly delegated to them, the shareholders cannot interfere. The powers as well as remuneration of the managing director will depend on the articles of association. The company, however, may, by its articles, reserve for itself the right of appointing its managing director. The salary of the managing director may also be fixed in the manner provided for in the shareholders' meeting. The managing director is not in the position of a clerk or servant of the company, and therefore, cannot claim any preferential treatment in case of winding up, but he may prove for salaries due to him in competition with the other creditors of the company.

We have seen that in case the directors act irregularly, e.g. without a quorum, that **irregularity may be ratified** by a subsequent meeting.

It is imperative that the **minutes** of the meetings of directors of the company should be entered in books kept for the purpose and such minutes, until the contrary is proved, shall be deemed to be the correct record of all proceedings at such meeting (S. 83)

### **Powers of Directors**

The exact powers of the directors largely depend on the clauses in the **articles** of association of the company concerned. Articles frequently lay down as is provided for by **Table A, Clause 71**, that the directors "may exercise all such powers of the company as are not, by the Companies Act, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall

invalidate any prior act of the directors which would have been valid if that regulation had not been made." In this case these **general powers** are wide and all embracing. In other cases **specific powers** in detail are laid down by the articles.

The directors should see that they act strictly within their powers. If the directors exceed their powers and do some acts beyond their powers, the company in general meeting may **ratify** these acts, provided the said acts are within the scope of the company's power (*William Irvine v. The Union Bank of Australia*, 1877, 2Ap. Case 366). This ratification may be made by an **ordinary resolution**. We have already seen how far a director can contract personally with the company. If the directors have done an *ultra vires* act which act happens to be *intra vires* the company, and the said company not only wants to ratify it but also wants to give power to its directors to do similar acts in the future, that would amount to altering the articles and would have to be done by a special resolution (*Grant v. United Kingdom Switch-back Ry. Co.*, 40 Ch. D. 138-139). The directors must act in the interest of the company and must **not** make any **secret profit** while allotting shares (*Parker v. McKenna*, 1875, 10 Ch. 96); or while making calls (*Giberts Case*, 1870, 5 Ch 559); and while forfeiting shares the same rule has to be observed because the power to forfeit is to be exercised for the benefit of the shareholders (*Harris v. The North Devon Ry. Co.*, 20 Bear. 384). The same principle applies when dealing with a transfer (*In re Cameron's C. S. L. Ry. Co.*, 1867, 5 De G. M. & G. 284).

### Directors' Remuneration

The remuneration of directors is a matter of internal arrangement and management (*Normandy v. Ind. Coops & Co. Ltd.*, 1908, 1 Ch. D. 84). Here, according to *Kekewich, J.*, "Apart from any prohibition in the memorandum of association . . . . it must be competent to the company to make a bargain with one of the directors, either for a reward to him for services rendered in the

past, or for remuneration to him for services to be rendered in the future, to do this with or without consideration, and if consideration enters into the bargain, to accept any deemed adequate. Even if apparently extravagant, the pension or remuneration cannot be open to criticism, it being entirely a matter for the company to decide what is right to be done."

The articles generally provide for a certain remuneration to be paid to the directors for services rendered and if not, they leave it to be determined by the company in general meeting. Where the articles fix a remuneration, it must be disclosed in the prospectus of the company issued in connection with its first issue. In the absence of this special provision, the directors are not entitled to claim any remuneration either by *quantum meruit* or otherwise, unless the company in general meeting allows it to be paid out of profits. According to *Lindley, L.J.*, "Directors have no right to be paid for their services, and cannot pay themselves or each other or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble, or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter" (*In re George Newman & Co.*, 1895, 1 Ch. D. 674).

This is because the question of their remuneration depends upon their agreement with the company, and in case any specific agreement is entered into, the articles must be referred to in order to ascertain the position. If, however, the articles provide for a remuneration, they would be entitled to claim it because it has been held that where the directors agree to act as such and the articles



provide for a share qualification as well as remuneration, the inference is that there is an implied agreement between the company and the directors to the effect that the directors shall take up and pay for the qualification shares according to the articles, on one part, and that the company shall, on the other part, pay him the remuneration provided for in the same articles (*Isaac's Case*, 1892, 2 Ch. D. 158). Here, the articles will be referred to with a view to ascertain what the terms agreed upon for their remuneration were. In the words of *Cozen-Hardy, L.J.*, "The articles, though not themselves a contract between the company and the director, must be regarded as showing the terms upon which on the one hand he agrees to act as director, and on the other hand, the company agrees to pay him remuneration for his services" (*Molineaux v. London, Birmingham and Manchester Insurance Co.*, 1902. 2 K. B. 589).

In cases where the remuneration is **fixed to be payable per year** there are a number of conflicting opinions but according to *Gore-Brown* (Joint Stock Companies, 35 Edn.), the resultant effect of all of them is that "a director's right to remuneration is not apportionable when the words conferring the right give him so much per annum, whether or not he is liable to removal or entitled to resign." When articles provided "the sum of £125 per annum per director" it was held that the articles did not entitle the director to recover remuneration for any less period than a year (*Inman v. Ackroyd & Bert Ltd.*, 1901, 1 K.B. 613). Also see (*Moriarty v. Regents' Garage & E. Co., Ltd.*, 1921, 2 K.B. 766). This principle, viz., that when a servant has agreed to serve for a fixed period for which a fixed amount is to be paid, he is not entitled to anything until he serves this period which is a condition precedent, was laid down over a century ago in *Cutler v. Powell*, 6 T.R. 320. They can themselves sue for their remuneration which is agreed upon impliedly or expressly (*Orton v. Cleveland etc. Co.*, 3 H. & C. 868). Where a yearly remuneration is provided for, it can be apportioned, but not otherwise (*Salton v. New Beeston Cycle Co.*, 1899, 1 Ch.

D. 775 ; *Iaman v. Ackroyd*, 1901, 1 K.B. 613). They can prove for their remuneration as **ordinary creditors** in a winding up (*Backwith's Case*, 1898 1 Ch. 324). This remuneration shall not include travelling expenses of the directors unless provided for. Again, where qualification shares are held by a director as a trustee on settled shares, it belongs to the estate, but if, on the other hand, a person is appointed a director of a corporation by some other company whose director he also was, and he transferred some of the shares of the first named company, which the said second company held in the name of this director with a view to giving him the required qualification to act as the director of the first named corporation, this would not fall under the above rule, and unless otherwise agreed, he would be entitled to retain the benefit himself. This is because according to *Warrington J.*, the right to a director's fees did not arise from the possession of the qualification shares. According to his Lordship, he obtained his fees by reason of the contract of service between him and the company for which he acted as a director (*Re Francis Berrett v. Fisher*, 1905, 74 L. J. Ch. 198; *Dover Coal Field Extension*, 1907, W. N. 119).

The remuneration is not to be paid free of income-tax, unless otherwise agreed upon. In case the director's remuneration is to depend upon a percentage on profit, he is not entitled to claim on that ground a percentage calculated on all the proceeds of the sale of the assets of the company unless there is an arrangement to that effect (*Frances v. Bultfontein Mining Co.*, 1891. 1 Ch 140). It is sometimes provided that the remuneration is to be paid to the directors out of profits only, in which case it cannot be paid out of capital, but there is nothing to prevent its being paid out of capital. It is open to directors by a resolution to renounce the right to future remuneration (*McConnell's Case*, *Re London and N. Bank*, 1901, 1 Ch. 728).

This, of course, applies to remuneration proper, but in case the shareholders vote a gratuity to the directors, the said gratuity will not be provable in case of the liquidation of the company.

In case the directors receive remuneration in excess of the amount payable to them, it will amount to a 'misfeasance', and the said excess will have to be refunded. Where a director is appointed also a receiver and manager on behalf of the debenture holders, he will be entitled to his remuneration in both the capacities, *viz.*, that of a director and a receiver (*South Western of Venezuela Railway*, 1902, 1 Ch. D. 701). The directors may, at their discretion, waive the whole or part of their remuneration.

It may be added here that in case a percentage upon the 'net profits' is payable to directors or managers as part or whole of their remuneration, the said 'net profits' for the year in question were the excess of the year over the current expenses and outgoings of the same year, *i. e.*, a fund which for that year was capable of being lawfully applied by the company to the payment of a dividend. This fund as a matter of law can only be arrived at after deducting excess profits duty which was a debt due by the company. No analogy between the incidence of income-tax and that of excess profits duty exists (*Patent Castings Syndicate, Ltd. v. Etherington*, 1919, 2 Ch. D. 254).

### **Liability of Directors**

We have seen that the directors enter into contracts on behalf of the company and with respect to these contracts, they are not personally liable as long as they do not exceed their authority, or do anything which is grossly negligent. Of course, if they give a personal guarantee with respect to any of the agreements, they would be liable on such a guarantee. With regard to their exceeding their authority it may be mentioned, that if the directors apply the money of the company for a purpose other than that for which the company is incorporated, they would be personally liable to make good such money.

We have already seen that a mere error of judgment will never make the directors personally liable, but something more, *i.e.* negligence or dishonest intention will have to be proved. In *re*

*Lagunas, Nitrate Company v. Lagunas Syndicate*, 1899, 2 Ch. D. 435; *Lindley, M. R.* says, "As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonable to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers. They did nothing *ultra vires*, fraud is not imputed. The enquiry, therefore, is reduced to want of care and *bona fides* with a view to the interests of the Nitrate Company. The amount of care to be taken is difficult to define : but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them (see *Overend, Gurney & Co. v. Gibb*, L.R.), H.L. 4805 Their negligence must be not the omission to take all possible care ; it must be much more blameable than that : it must be in a business sense culpable or gross. I do not know how better to describe it." This principle was confirmed in *Re National Bank of Wales, Ltd.*, 1899, 2 Ch. D. 629.

A summary of duties and liabilities of the directors as laid down by *Romer J.* in the recent case *In re City Equitable Fire Insurance Co., Ltd.*, 1925, 1 Ch. D. 407 has already been dealt with in previous pages. Generally speaking, what is expected of a director is to exercise as such **reasonable care** in the conduct of the business of the company as a prudent businessman would do in case the business was his own. A director who is entrusted with any money by the company is bound to make good the same if he has not dealt with the money according to the provisions of the memorandum and the articles as he was asked to do, although he may not have derived any benefit therefrom and there was no corrupt motive (*Ex parte Pelly*, 1882, 21 Ch. D. 492 see p. 509). See also *In re Sharpe*, 1892, 1 Ch. at pages 165 and 166 where *Lindley L.J.* has laid down that "as soon as the conclusion is

arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted." But where the director has been acting within his powers as the agent of the company, and while so acting incurs some liability, he is entitled to be **indemnified** by the company for it, e.g., as in one case *Famatina Development Corporation*, 1914, 2 Ch. D. 271, where a director successfully defended a libel action in connection with a statement made in the report, he was held to be entitled to his costs. A director who has not been attending Board meetings will not be liable on the charge of negligence for that reason only (*Marquis of Bute's Case*, 1892, 2 Ch. D. 100). In case a director signs bills of exchange not bearing the company's name he becomes personally liable. Directors who sanction payment on behalf of the company, ought to see that the said payments are properly made, i.e., they are made for the purposes which come within the scope of the company's operation. The directors are, however, **not responsible for misconduct of their co-directors**, or of other persons employed in the company, if they were not aware of it.

One of the most important duties of the directors is to see that **a general meeting** of the company, public or private, is held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting (S 76). In case of a public company it is also their duty, after the **balance sheet and profit and loss account** have been laid before the company at the general meeting, to file a copy of the balance sheet signed by the manager or secretary of the company with the registrar at the same time as the copy of the **annual list of members and summary** prepared in accordance with Sec. 32. Failure to do either entails a fine. If a director is prosecuted for not filing this **balance sheet with the registrar as required by Sec. 134(4) or the Act**, he cannot plead, in answer, that an annual general meeting

was not called and therefore a balance sheet was not laid before the meeting (*Dabendranath Das Gupta v. Registrar of Joint Stock Companies*, 1918, 45 Cal. 486; See also *Emp. v. Nasurbhai*, 1923, 25 Bom. L.R. 224).

### Limited Liability of Directors

We have already seen that, in accordance with Sec. 70, the liability of directors of a limited company **may**, if so provided by its memorandum, **be unlimited**. In this case the member who proposes a person for election, or appointment to the office of director, shall add to that proposal a **statement** that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall **before the person** accepts the office or acts therein, give him **notice in writing** that his liability will be unlimited. A limited company can, even after its incorporation in accordance with Sec. 71, if authorised by its articles, alter its memorandum by special resolution so as to render unlimited the liability of its directors or of any director. In such a case such a director or directors in addition to his or their liability, if any, to contribute as ordinary member or members, will be liable to make contribution on the same basis as if he were a member of an unlimited company in liquidation. This will, of course, not apply to a past director who ceases to hold office for a year or upward before the commencement of the winding up, nor will it apply in a case where the liability in respect of which the said contribution is levied was incurred after the directors ceased to hold office. Here also, subject to the articles, a director shall not be liable to make such further contribution unless the Court deems the said contribution necessary in order to satisfy the debts and liabilities of the company, *plus* the costs, charges and expenses of the winding up (S. 157).

### New Issue for the Company's Benefit

In *Piercy v. S. Mills & Co., Ltd.*, 1920, 1 Ch. D. 77 it was held that, the power vested in the directors of a joint stock company

to issue more shares, in order to raise more capital, must be exercised *bona fide* for the **benefit of the company**. Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

The **fiduciary position** of the directors forces on them the duty of abstaining from making any **secret profit** or using that position to benefit themselves in any other way such as by bribes allotting themselves fully paid shares (*Madrid Bank v. Relly*, 1867, 7 Eq. 442; *Parker v. McKenna*, 1875, 10 Ch. 96).

### Liability through Contract

Besides this, the directors may make themselves liable on contracts which they make on behalf of the company, by **exceeding their authority**, and in such cases they make themselves **personally liable** to an action of damages for **breach of warranty of authority** (*Collen v. Wright*, 1857, 8 E. & B. 647; *Coventry's Case, Britannia Fire Association*, 1891, 1 Ch. 202). Here their position is that of **agents** as we have seen before; and therefore if the liability is saddled on them, it will be on the footing that as agents, they do not contract within their position as directors. This will happen where the contract is in their own personal names without disclosing that they were acting as agents of the company. If for example, they **sign** themselves as :—

X., Y., Z.,

Directors of,

The Bombay Trading Co.,

they would be personally liable because here they did not, on the fact of the document, sign on behalf of the company but for themselves. Even where they begin the documents as 'We the directors of the Bombay Trading Co., Ltd., hereby agree' and then sign as:—X., Y., Z., they would be personally liable (*Aggs v. Nicholson*, 1856, 1 H. & N. Ex. Rep. 165; *McCullin v.*

*Gilpin*, 1880, 5 Q.B.D. 390). Thus in order to exclude personal liability it is necessary to sign "for", "on behalf of", or "per pro" the company.

The directors have to take particular care while signing bills of exchange, as otherwise they may be saddled with personal liability as has happened in numerous cases. Sections 73 and 74 deal particularly with the case of bills of exchange, *hundis*, promissory notes, endorsements, cheques and orders for money or goods purported to be signed by or on behalf of the company. In this connection it is laid down that the name of the company with the word "limited" should be mentioned specifically when the directors sign on behalf of the company and if, in the case of bills of exchange, *hundis*, promissory notes, cheques, or orders for money or goods this is not done, *i.e.*, the name of the company is not mentioned in the manner required by these sections, the directors and officers concerned will not only be liable to a fine not exceeding Rs. 500 but they shall further be personally liable to the holder of such documents for the amount thereof unless the same is duly paid by the company.

### Directors' Contracts with the Company

We have thus seen one aspect of the contracts by directors, *viz.*, directors' power to enter into contracts on behalf of the company. The next point to consider is the position of the directors to contract with the company on their own behalf or in their own interests. Here the position is that directors cannot enter into contracts with their company unless the articles of association otherwise provide (*Albion Steel and Wire Co. v. Martin*, 1875, 1 Ch. D. 580). In practice almost all companies now provide for this power in their articles. The reason is that here they are in a fiduciary position and their interests are in conflict with their duties. Thus in the absence of such a provision as above stated in the articles, even though the contract may be quite above board, it will not make any difference in law, as the company is entitled to



have the benefit of the collective wisdom of its directors (*Imperial Mercantile Credit Association v. Coleman*, 1871, 6 Ch. 558; *Ramaswamy Aiyar v. Madras T. P. & P. Co.*, 1915, 38 Mad. 991). But as these cases show, the company can waive the benefit of this rule.

The Indian Companies (Amendment) Act, 1936, further lays down that in case of certain specific contracts by a director with the company such as those for sale purpose or supply of goods and materials, consent of the directors has to be obtained (S. 86F). It is also laid down further that the directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting, (a) sell or dispose of the undertaking of the company or (b) remit any debt due by a director.

Directors who have wrongfully taken the benefit of a contract with their company, must **indemnify** the company (*Eastern Shipping Co. v. Quah Beng Kee*, 1924, A.C. 177). A company may, however, in the absence of such an article sanction a contract with a director in a **general meeting** (*Grant v. United Kingdom Switchback Ry. Co.*, 1889, 40 Ch. D. 138), but here care should be taken to see that the notice convening the meeting to consider such a contract gives particulars as to such a contract (*Kaye v. Croydon Tramways Co.*, 1898, 1 Ch. 358; *Normandy v. Ind. Coope & Co.* 1908, 1 Ch. 84).

The **disclosure of interest to brother directors** must be full and fair, and that too to **independent directors** who are not interested. This rule cannot be evaded by splitting the resolution or reducing the quorum (*Turnbull v. West Riding Club*, 1894, 70 L.T. 92; *Gluckstein v. Barnes*, 1900, A.C. 240; *Greymouth P. E. Ry. Co.*, 1904, 1 Ch. 32; *Re Sir Hormusji A. Wadia*, 1921, 23 Bom. L.R. 1104; *Re North Eastern Insurance Co.*, 1919, 1 Ch. 198). When directors obtain a contract in their own name but under circumstances amounting to a breach of trust they will be liable to the company (*Cooke v. Deeks*, 1916, 1 A.C. 554). Even an article

which permits the directors to contract with the company "without disclosing their interest" would be bad (Ss. 91A and 91B).

A power to contract with firms in which directors are interested does not authorise a contract by them individually with the company (*Transvaal Lands Co. v. New Belgium Land & Development Co.*, 1914, 2 Ch. 488). Where vendors who have become directors have covenanted to serve for a given number of years and not to compete with the company during these years, they are discharged from this obligation if their services are dispensed with as soon as the company goes into liquidation. The result is that they are free to enter into competing business (*General Bill Posting Co. v. Atkinson*, 1909, A.C. 118; *Measures*, 1910, 2 Ch. 248). A director is interested in the issue of debentures which are so issued to secure a debt which he has guaranteed (*Victors v. Lingard*, 1927, 1 Ch. 323).

A director interested in a contract with the company though prevented from voting at a board meeting, **can vote at a shareholders' general meeting** (*North West Transportation Co. v. Beatty*, 1887, 12 A.C. 589). In one case, however, it has been held that the directors cannot use their voting power as shareholders, to deprive a company of property which belongs to the company in equity (*Cook v. Deeks*, 1916, 1 A.C. 554).

### **Liability for Negligence.**

No doubt directors do not bring with them any special qualifications for their office but they are bound, while acting as directors to act with such **care as can reasonably be expected of them** having regard to the knowledge and experience they happen to possess (*In re Brazilian Rubber Plantations*, 1911, 1 Ch. 425). In this connection the Indian Companies Act, Sec. 281 as amended by the Indian Companies (Amendment) Act of 1936 gives a certain amount of **protection** to the directors, managers, managing agents, officers and auditors of the company :—

*If in any proceeding for negligence, default, breach of duty or breach of trust against directors, managers, managing agents, officers and auditors of a company, it appears to the Court on hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit (S. 281 (1)).*

*It is further laid down that where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought (S. 218 (2)).*

In an action against a director for negligence it is necessary to prove **actual damage** suffered by the company because negligence by itself is not actionable. Moreover, directors cannot be sued for negligence, if the loss is caused to the company through the reliance placed by the directors on the judgment and information of any person who has been placed in a position of trust for the purpose of attending to the details of management of the company, provided of course the directors had no reason to doubt that person's honesty or competence.

In such cases, the civil remedy if the company is not in the course of winding up, is by action for damages. When, however, the **company is being wound up a misfeasance summons** may be taken in accordance with section 235 of the Indian Act (S. 276 of the English Act).

## Misfeasance and Breach of Trust

We have already noticed, in detail, the various acts which involve a liability on directors and officers to make good or to account for money which they have either misapplied or wrongfully received in a fiduciary capacity which they are liable to account for. Section 235 lays down that where in course of winding up the company, it appears that any person who was taking part in the formation of the company, or any past or present director, manager or liquidator, or any officer of the company has **misapplied or retained** or become liable or **accountable** for any money or property of the company, or been guilty of any **misfeasance or breach of trust** in relation to the company, the Court may, on the **application** of the **liquidator**, or of any **creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer**, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to **repay or restore** the money or property or any part thereof respectively **with interest** at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of **compensation** in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just. It is further laid down that this section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible. The words in italics are only to be found in the Indian Act.

It has been held that this section cannot be applied to every case in which a company has a right of action against an officer; but only when there is something in the nature of a breach of duty, the direct result of which is a misapplication of the company's assets (*Re Etio, Ltd.*, (1928), Ch. 861).

Proceeding for misfeasance can be brought against *de facto* directors (*Coventry & Dixon's Case*, 1880, 14 Ch. D. 660). It has

been held recently by the Madras High Court that misfeasance proceedings under S. 235 cannot be continued against the heirs of a deceased director (*Sankaram v. Kottayam Bank, A.I.R. (1946) Mad. 304*).

### **Criminal Liability of Directors.**

The English and Indian Companies Acts contain several sections imposing statutory penalties of non-compliance with specific provisions of the Act, e.g. section 31 provides a fine for omission to keep a register of members and section 236 provides a term of imprisonment and fine for falsification of books and section 238 for false evidence.

Apart from these provisions in the Act directors may incur criminal liability either at Common Law or under some statute and also under the Indian Penal Code.

### **Prosecution of delinquent Directors.**

Under the old Act there was no power given to the Public Prosecutor to launch a prosecution against delinquent directors; the result was that the liquidator either in voluntary or compulsory liquidation had to do that on their own responsibility out of the assets of the company concerned. In many cases where the creditors had already lost their money in a company they were naturally reluctant to waste any more money on prosecutions with the result that the delinquent directors and officers escaped the punishment for their offences. On the recommendation of the Greene Commission, the English Act of 1929 introduced provisions by which the delinquent directors could be prosecuted which provisions have been copied by our Indian Companies (Amendment) Act of 1936. They are as follows :—

*Sec. 237 (1). If it appears to the Court in the course of a winding up by, or subject to the supervision of the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in rela-*

*tion to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.*

*(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.*

*(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the Central Government for further inquiry, and the Central Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Central Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of the winding up by the Court.*

*(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.*

*(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as*

*aforsaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provision of sub-section (2).*

*(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate General or the public prosecutor and if advised to do so institute proceedings, and it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give him all assistance in connection with the prosecution which he is reasonably able to give :*

*Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.*

*For the purposes of this sub-section, the expression 'agent' in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.*

*(7) If any person fails or neglects to give assistance in manner required by sub-section (6), the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.*

## Meeting of Directors

With reference to the meeting of directors the following summarised points should be noted :—

(1) The directors must **act as a board** and a single director as such has no power to bind the company unless given a special delegation under the constitution of the company.

(3) Proper **notice** should be given of the board meeting to all the directors unless the dates of meetings are pre-arranged and the articles do not specifically provide for notice.

(3) The board must act with a **quorum** and the quorum must be properly constituted.

(4) Unless specially authorised by the articles in certain specific cases to decide questions by circulars, the directors must meet and decide questions by resolutions.

(5) There must be a **Chairman** present at the meeting or one must be appointed.

(6) Every directors has **one vote** unless the articles otherwise provide.

(7) The Directors may divide their functions and delegate them to **committees** when so authorised by the articles of association.

(8) In connection with the **minutes** the directors must see that the minutes form a proper record of the meetings they have attended and while confirming or passing the minutes only those who were present at the meeting of which minutes were being considered can vote.

(9) The directors have a right to **inspect** the minute books and may not be prevented from so doing except where it is proved to the satisfaction of the Court that there are no reasonable grounds for inspection or when they are not acting *bona fide* and in the best interests of the company (*R. v. Hampstead, B. C.*, 1917, 116 L.T. 212).



### Committees Appointed by Directors.

It is quite usual in large companies for the board to divide itself into a number of committees, such as the finance committee, the works committee, the shares transfer committee, the general purposes committee etc., to each of which special functions are allocated. This can only be done where the **articles** of the company concerned permit such delegation. When appointing the committee care should be taken to state the quorum, otherwise it would be presumed that the delegation is to the whole body and that all must be present, and the power to act by the number less than the delegated authority of the committee is not presumed. Neither can they add to their number to supply a vacancy (*Re. Liverpool Household Stores' Association*, 1890, 59 L. J. Ch. 616 at p. 624). These committees look after the administration of their respective sphere of work and report at fixed intervals to the general board who formally adopts their report. Special minute books are maintained to record minutes of the work of each of these committees. The finance committee looks after the financial problems, the works committee deals with the work of the administration, the share transfer committee deals with the transfer application for shares, etc. This division of work brings about the best result, both with regard to the economy of time and labour and efficiency of administrative work through its concentration in the hands of those who happen to be most capable to deal with it. Where such a committee is appointed an excessive exercise of the powers of the said committee may be **ratified** by the directors (*Bolton Partners v. Lambert*, 1889, 41 Ch. D. 295 C.A.). The simple act of delegation by the directors does not divest the Board of Directors of their own powers (*Huth v. Clarke*, 1890, 25 Q. B. D. 391). Such a committee may even consist of **one person** (*Re. Taurine Co.*, 1884, 25 Ch. D. 118).

### Secret profits and commission.

We have already seen that the directors are **agents** of the company and thus they should on no account make **secret**

**profits.** Here, the rules of law in connection with principal and agent, will apply. If, however, the director as agent makes any secret or undisclosed profit, he shall have to account to his principal, *i.e.*, the company, for every such benefit. This will apply even though in obtaining such benefit he incurred a risk or loss. On the same principle, where the directors receive by way of presents shares as fully paid, they have been held to be responsible to make good the money out of their pocket, and in calculating the amount they thus owe to the company, the maximum market value will be considered.

We have already seen that section 91A provides that the director who is directly or indirectly concerned or **interested in any contract** or arrangement entered into by or on behalf of the company, shall disclose the nature of such interest at the meeting of the directors at which the contract or arrangement is determined in case such interest was then existing, or in any other case, he should make such disclosure at the first meeting of the directors after the acquisition of the said interest. Failure to observe the provisions of this section makes the director liable to a **fine** not exceeding one thousand rupees, besides his other liability for **non-disclosure**. Besides this, a director of a public company is not allowed to vote as a director on a contract in which he is either directly or indirectly concerned and in case he votes, his vote is not to be counted. Under Sec. 91B too, a fine not exceeding rupees one thousand is reserved in case the director disobeys the requirements of this section. Not only can the company recover this secret commission, or profit; or bribe, from the directors or the agents, but also from the person giving it, and besides, if the company has suffered a larger damage than the amount covered by the bribe, it can by proving it recover it from the person giving it (*Hovenden v. Millhoff*, 1900, 83 L.T. 41).

### **Names of Directors**

The names of the directors of every joint stock company must be filed with the registrar at the time of registering the

memorandum and the articles of the company together with their written assent to act as such. Every director should, except in the case of companies not having a share capital, either sign the memorandum for a number of shares not less than his qualification (if any) *or take from the company and pay or agree to pay for his qualification shares* or must sign and file with the Registrar a contract in writing to take from the company and pay for his qualification shares (if any) *or make and file with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any) are registered in his name.* This section does not apply to a private company or a company which was a private company before becoming a public company (S. 84). Besides this, the company shall keep at its registered office a register containing the names, addresses and occupations of its directors. The copy of this register, together with the alterations from time to time, has also to be filed with the registrar. Failure to comply with this requirement makes every officer of the company responsible for it liable to a fine not exceeding rupees fifty per day.

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## CHAPTER XI.

# DEBENTURES AND BORROWING

### Borrowing powers

The borrowing powers of a joint stock company depend upon its constitution and the nature of its business. **Trading companies have implied powers to borrow** for the purposes of their business. It is, however, customary for every company to reserve to itself the power to borrow in its memorandum or articles or both because otherwise the company cannot borrow unless the nature of its business implies a borrowing power. Thus a school-board and a building society have been held not to have an implied power to borrow. Once the power to borrow is given, the company can charge or mortgage its property for the purpose of raising a loan, though generally, when the power of borrowing is taken, the power to mortgage is also expressly reserved. It has been decided that power to mortgage "assets" or "property and rights", or "property and effects" will include power to charge uncalled capital; but only "property" or real and personal estate" or "property and funds" will not include such a power to borrow on uncalled capital unless articles specially declare the uncalled capital as chargeable property (*Hume v Drachenfels, B. G. Mng. Syndicate*, 1895 Mans. 146).

These powers to borrow are generally exercised by the Board of Directors, but the constitution of the company may lay down such rules as they may consider necessary with a view to curtail, or to provide a check on the directors' power to borrow. Once the power to borrow is given *and exercised by the proper authorities*, it is not the lookout of outsiders to see that the various formalities required have been complied with by the officers of the company. For this purpose it has been held that overdrawing a banking account was in substance a borrowing of money (*In re Pyle Works*, No. 2, 1891, 1 Ch. D. 184).

Apart from the power to borrow, the Indian Companies (Amendment) Act, 1936, lays down **certain limitations on the powers of companies to lend money**. Thus a company incorporated after the commencement of this Act cannot make any loan to or guarantee any loan made by any company under the management of the same managing agent. Further, after the expiry of six months from the commencement of the Act no company, whether incorporated before or after the Act, may make any loan or give any guarantee except by way of renewal of any existing loan or guarantee (S. 87E (1) ). Any default would entail, on any director or officer of the company knowingly and wilfully guilty, a fine not exceeding one thousand rupees and they would be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee (S. 87E (2) ). The purchase of the shares or debentures of another company under the same management (except in case of an investment company) is also prohibited unless the purchase has been previously approved by a unanimous decision of the Board of Directors of the purchasing company (S. 87F). It is further laid down that a managing agent shall not exercise a power to issue debentures in case of a company under his management, or except with the authority of the directors, and that too within the limits fixed by them, a power to invest the funds of the company, and any delegation of such power by a company to a managing agent shall be void (S. 87G ).

The lender has to take care to see not only that the company has the power to borrow, but that the said power is vested in the directors, because otherwise his only remedy will be against the directors for damages in case the company repudiates the transaction (*Fairbank's Executors v. Humphrys*, 1887, 18 Q.B.D. 54). If the directors borrow beyond the limits no debt is created and the securities are void (*Howard v. Patent Ivory Mfg. Co.*, 1888, 38 Ch. D. 156 App. 170). The fact that originally *ultra vires* loans are attempted to be substantiated by a subsequent power to lend and subsequent issue of securities will not make them valid (*In re Ex parte Watson*, 1898, 21 Q.B. 301 ; *Re the Bottomgate Indu-*

*strial Co-operative Society*, 65 L.T. 712; *Sinclair v. Brougham*, 1914, Ap. Cas. 398). It is also a principle that though the lender is not bound to inquire the purpose for which the money is borrowed, if he knows at the time he lends that the amount is borrowed for an illegitimate purpose he cannot recover the money lent (*Davis' Case*, 1871, 12 Eq. 1516). In case the loan is taken for a purpose which is not legitimate, the lender will not lose his money on that ground if he did not know of this fact, because it has been held that he is not bound to enquire as to the purpose for which the said loan was taken. All that he has to be satisfied about is that the company has general or specific powers to borrow money for the purpose of its business (*Young v. David Payne & Co., Ltd.*, 1904, 2 Ch. D. 608).

In connection with this borrowing power it may be further added that where the memorandum, or the articles permit, a company can borrow money on the security of its **uncalled capital** just as well as it can on that of any of its assets (*Newton v. Debenture-holders and Liquidators of Anglo-Australian Investment Co.*, 1895, A.C. 244). A company **cannot**, however, borrow money on the security of its **reserve capital** as this can only be called up on winding up (*Bartlett v. Mayfair Property Co.*, (1898) 2 Ch. 283), **nor** of its statutory **books** as these must be kept at the company's office for inspection (*Engel v. South Metropolitan Co.* (1892) 1 Ch. 442). It has also been held that **no charge** can be created over the **liability of the members of a guarantee company** (*Pyle Works Ltd.* (1890) 44 Ch. D. 574).

### **The Debenture**

The most usual method of borrowing by a public company is through the medium of debentures or debenture stock.

A "debenture" is a certificate issued by the company acknowledging the debt due by it to its holders. It may be carrying a charge, or it may be without a charge or mortgage on the property of the company. *Chitty J.*, while speaking of

debentures states as follows: "The term itself imports a debt—acknowledgment of a debt—and speaking of the numerous and various forms of investments which have been called debentures without any one being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. Thus there are debentures which are secured, and debentures which are not secured" (*Edmons v. Blaina Furnaces Co.*, 1887, 36 Ch. D. 215). There may be a single debenture issued to one person (*Robson v. Smith*, 1895, 2 Ch. 118).

It will be thus seen that any company which has the power to borrow can issue debentures. A public company cannot exercise the right to borrow or issue debentures until it is entitled to commence business. A debenture may be a "floating" or a "fixed" charge debenture. A floating-charge means that the holder of the debenture has a right to be paid out of the assets of the company, but the company is left free to deal with all the assets until or unless the charge becomes fixed through the capital, or the interest, falling due under the terms of the issue. The floating-charge is crystallised into a fixed charge under any of the following three circumstances, (1) when interest becomes overdue, (2) when the capital debt falls due, and is not paid, and (3) when the company goes into liquidation. Thus, in case of a floating-charge, the directors are free not only to sell the property so charged, but also to mortgage it for the purposes of the business. This mortgage would take priority over the right of the holders of floating debentures.

The fixed charge, however, creates a mortgage on some specific property of the company in favour of debenture holders. These debentures are also called mortgage debentures. There is yet a third class of debentures known as ordinary or naked debentures, which give no charge whatever on the assets of the company and evidence nothing more than an ordinary debt.

Thus the holders of naked debentures are ordinary creditors of the company. Frequently provisions are inserted in the debentures giving the power to the majority to bind the minority by modifying their rights and this is quite in order (*Sneath v. Vally Gold Ltd.*, 1893, 1 Ch. D. 477). It, however, should be noted that where such a power is given to some only of the debenture holders they must exercise it in the interests of all the debenture holders (*In re Maskelyne B. T. Ltd.*, 1898, 1 Ch. D. 133). In one case (*In re Dunderland Iron Ore Co., Ltd.*, 1909, 1 Ch. D. 446), where there was a trust-deed between the company and the trustees on behalf of the debenture holders, and the certificates issued to the debenture holders did not contain any direct covenant with the stock holder to pay him interest, but merely stated that the same was "issued subject to the provisions contained" in the trust-deed, it was held that debenture holders as such were not creditors of the company and thus could not prevent a winding up petition even though their interest was in arrears. Again in case the registered debenture does not contain any provision appointing a particular place for payment, the ordinary rule as to debtor and creditor will apply, and the company must seek the debenture holder if he is within the realm and tender the money due on it without request, otherwise the debenture holders can recover interest on the principal money down to the date of payment (*Fowler v. Midland E. Cor.*, 1917, 1 Ch. D. 656).

In case of a **floating-charge**, however, if it is specifically declared that the company shall not mortgage any of its property in priority to, or at par with, the holders of floating debentures, the holders would be protected. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance (S. 128).

The difference between debentures and debenture stock is almost the same as between shares and stock *i.e.* debenture stock must be fully paid and may be divided into fractional parts. Thus debentures are issued in a series for a fixed time, and thus each of



these debentures is transferable in full and not in any fractional parts, whereas the debenture stock is considered as one debt due to a number of holders which can be transferred in fractional parts according to the multiples agreed upon. The debenture stock is generally secured by a trust-deed giving a mortgage or charge on some specific property of the company in favour of some person or persons appointed as trustees on behalf of the debenture holders.

According to Sec. 227 (2) "in the case of a winding up by or subject to supervision of the Court every disposition of the property (including actionable claims) of the company . . . . made after the commencement of the winding up, shall unless the Court otherwise orders, be void." In one case where between the date of the presentation of the petition and the order for its compulsory winding up, a debenture was issued by the company to secure the repayment of a loan of £1,200 raised to enable the company to pay wages due to the staff, and the debenture holder was aware that the petition for winding up the company had been presented, the Court declared the debenture valid: *Romer J.*, in his judgment here quoted *Lord Cairns (In re Wiltshire Iron Co., L. R. 3 Ch. 443, 446)* in support, where the latter referring to the provision of this section says that it was "a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremes. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, *bona fide* entered into and completed, would be avoided and would rest, in the discretion given to the Court, be maintained, the result would be that the presentation of a petition, groundless or well founded, would *ipso facto*, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company." He therefore held that as these £1,200 were advanced for the preservation of the

business as a going concern in must be declared valid (*In re Park Ward & Co., Ltd.*, 1926, 1 Ch. D. 828).

It is the practice of some companies to issue a **prospectus** at the time of the issue of debentures in which various conditions are referred to. In such cases when the conditions as referred to in the debenture certificates or debenture trust-deed differ from those referred to in the debenture prospectus, then the former are followed and the prospectus cannot be referred to. According to *North J. In re Chicago and North West G. Co., Ltd.*, 1898, 1 Ch. 263, "*Prima facie* the debenture was the contract and the whole contract between the company and the debenture holder and that the prospectus cannot be looked at for the purpose of seeing what the contract was" (Also see *In re Tewkesbury Gas Co.*, 1911, 2 Ch. 279). It may be added, however, that this does not prevent the debenture holders, provided they are in time, from seeking to rescind or rectify their contracts on the ground of fraud or mistake, or from suing for damages occasioned by **fraudulent misrepresentation**, in which case it would be legitimate to refer to the statements in the prospectus on the faith of which they became debenture holders (*British Equitable A. Co. Ltd. v. Baily*, 1906, Ap. Cas. 35 at p. 41 per Lindley J.)

### Classes of Debentures

Debentures are divided into two main classes, *viz.*, (1) **registered** debentures and (2) **bearer** debentures. Either of these two classes may be debentures which are (a) **unsecured** or (b) **secured**. The unsecured debentures are now-a-days rare and they do not carry any charge on the assets of the company. This means that the holder of an unsecured debenture is an ordinary creditor of the company. In case of secured debentures there is a further sub-division, *viz.*, that :—

- (1) the charge may be a **floating-charge** on the whole of the undertaking of the company, or

- (2) it may be a **specific charge** over stated assets usually immoveable property or both, and
- (3) it may be both a **floating and specific charge**.

### Registered Debentures

The majority of debentures issued by most of the companies in India are registered debentures. They are called registered because the name of the holder of such debentures is recorded in the books of the company as well as on the certificate issued. Thus in order to **transfer** them, a regular transfer form will have to be filled in and signed. This is the safest type of debenture because, in the case of bearer debentures, as we shall soon see, they being negotiable instruments, a loss or misplacement of the debenture instrument and the passing of it into the hands of a *bona fide* holder for value would deprive the owner of his rights. The other advantage is that the names of the holders being registered in the books of the company, notices and other communication can be sent to them direct by the company instead of through the indirect method of communicating with them through newspapers. The **interest** due on these registered debentures may be paid either by interest warrant drawn on the company's bankers posted to the registered holder or to the first named of joint holders. There is the other method, as we have seen above, of attaching to the debenture bond or certificate the series of **interest coupons** which are to be cashed by a holder as each falls due, and when the last of the coupons is being cashed, which is known as a "**talon**", the company issues to the holder a fresh series of coupons for future interest payments.

### Debentures to Bearer

This form of debentures is quite familiar to English investors and is also familiar over here. Kennedy J., in *Bechuana-land*, London Trading Bank, 1898, 2 Q. B.

658, decided in case of **bearer debentures** that according to the "usage of the mercantile world the debentures were treated as **negotiable instruments**, passing like promissory notes, or bank notes, by mere delivery from hand to hand". In a subsequent case *Edelstein v. Schuler & Co.*, 1902, 2 K.B. 144, it was laid down that it was not now necessary to tender evidence to prove that bonds of this kind are negotiable instruments that being a fact of which the Court will take judicial notice (*Rumball v. Metropolitan Bank*, 1877, 2 Q.B. 194; *Goodwin v. Roberts*, 1876, 1 A.C. 476). **Interest coupons** entitling the bearer thereof to payment are attached to the debenture instrument.

The other decisions where debentures have been declared to be negotiable instruments are *Goodwin v. Roberts*, 1875, 10 Ex. Cas. 337 in which the foreign government scrips payable to bearer were declared negotiable instruments and *Bechuanaland Exploration Co. v. London Trading Bank*, 1898, 2 Q.B. 658 was a case of English bearer debentures. The holders of bearer debentures are in some cases given the right to get their debentures converted into registered debentures and *vice versa*. In case of bearer debentures where the holders cannot be found it may be necessary for the company or the trustee to apply to the Court for direction. In English Courts summons for direction have to be taken out for this purpose. Interested parties and the Attorney General are to be made parties (*Re Chilago Ry. & Mines Ltd.*, 1930, 46 T.L.R. 242).

### **Redeemable and Irredeemable Debentures**

Usually, debentures are made redeemable at the expiration of a certain number of years but they may be made redeemable on demand or they may be irredeemable.

In this connection the provision of Sec. 126 of the Indian Companies Act is important. This section lays down as follows:—

*Sec. 126. "A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by*

*reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long."*

Here it should be noted that an irredeemable or perpetual debenture is not in fact a mortgage at all but is in effect an annuity in perpetuity to the holder. The word "irredeemable" may mean either that they are debentures which the company has no power to redeem and the holder has no right to demand redemption, or it may mean that though the holder cannot force the company to redeem, the company may at its pleasure if it so desires redeem them at any time. Of course these irredeemable debentures become immediately payable either when the company goes into liquidation or in the event of its interest falling in arrears. This is the case even though the liquidation may be for the purpose of reconstruction or amalgamation, and even though there may be an express provision to the contrary (*Re Crompton & Co.*, 1914, 1 Ch. 954).

### Mortgage or Charge

With regard to the mortgage or charge created on the debentures it is provided for by the Indian Companies Act that proper particulars as to every such mortgage or charge together with instruments, if any, by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, should be filed with the registrar for registration within twenty-one days after the date of creation. If this is not done, the said mortgage or charge shall be void against the liquidator or any of the creditors (S. 109). In *In re Monolithic Building Co., Tacen v. The Company*, 1915, 1 Ch. D. 643, it was laid down that Sec. 93 (our corresponding Sec. 109) of the Companies (Consolidation) Act 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer even though he had express notice of the prior mortgage at the time when he took his own security. In a Bombay case, *D. Pudumji & Co. v. N. H. Moos*, 27 Bom. L. R. 1218, where the sole managing director of a private limited company borrowed

a sum on condition that "pending the execution of the mortgage deed the borrowers put the lender in possession of all property of the borrowers made up of printing machinery, papers and other moveable property of a newspaper printing concern and the directors of the borrowers shall hold possession of the same as agents of the lender and shall not sell the same without consent of the lender" it was held that here the parties did not create a pledge but intended to create a floating-charge on the moveable property under the meaning of Sec. 109 and therefore the charge was void for want of registration. In another case where a company carrying on business as merchants consigned goods overseas and obtained advances from their bankers and wrote to them enclosing for the banker's acceptance the company's drafts drawn on these shipments and copies of bills of lading and invoices that the company hypothecated the goods or proceeds to the said bankers, it was held that the effect of the transaction was that the company had created a charge on the company's book debts, which charge not having been registered was void against the liquidator (*Ladenburg & Co. v. Goodwin Ferreira & Co.*, 1912, 3 K.B. 275).

In case, however, the debentures are issued in a series in which reference is given to any mortgage or charge or to any other instrument giving such a mortgage, to which debenture holders of that series are entitled *pari passu*, the particulars as to the amount secured by the whole series, the date of the resolution authorising the issue and the date of the covering deed, if any, by which the security is created or defined, a general description of the property charged and the names of the trustees if any, for the debenture holders, together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, should be registered with the registrar (S. 110).

Where any commission, bonus, or discount has to be paid directly or indirectly in connection with the issue of these debentures, the particulars of such discount, or commission, or allowance

payable as to the amount or rate per cent should also be included in the particulars supplied to the registrar for registration (S. 111).

### Charges to be Registered

In this connection Sec. 109 of the Indian Companies Act is very important.

Sec. 109 (1) Every mortgage or charge created after the commencement of this Act by a company and being either ;—

(a) a mortgage or charge for the purpose of securing any issue of debentures, or

(b) a mortgage or charge on uncalled share capital of the company, or

(c) a mortgage or charge on any immovable property wherever situate, or any interest therein, or

(d) a mortgage or charge on any book debts of the company,

(e) a mortgage or charge not being a pledge on any moveable property of the company except stock-in-trade, or

(f) a floating charge on the undertaking or property of the company ;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable.

Provided that—

(i) in the case of a mortgage or charge created out of British India comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar, and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or

purporting to create the mortgage or charge or a copy thereof verified in the manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate ;

- (iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purpose of this section, be treated as a mortgage or charge on those book debts ; and
- (iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

*(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.*

The above Sec. 109 (1) (e) now makes it compulsory for every mortgage on moveable property as distinguished from a pledge, to be registered which was not the case under the old Act, whereas Sec. 109 (2) is designed to affect transferees with notice as from the date of registration. According to Sec. 109 A, if, after the commencement of the Amendment Act a company registered in British India acquires any property subject to a charge of any kind as would if it had been created by the company after the acquisition of the same require registration under Sec. 109 the company must cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty one days after the date on which the acquisition is completed. Where, however, the property is situate and the charge was created, outside India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted



for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar. In case of default the company and every officer of the company who is knowingly and withfully in default shall be liable to a fine of five hundred rupees.

In this connection the provision of Sec. 120 is important. This section here provides a **remedy** in cases where the omission to register a mortgage within the twenty one days prescribed is accidental or due to inadvertence- or due to some other sufficient cause. The section runs as under :—

*Sec. 120. (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by Sec. 109, or that the omission or misstatement of any particular with respect to any such mortgage or charge, or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended or, as the case may be, that the omission or misstatement be rectified, and may make such order as to the costs of the application as it thinks fit.*

*(2) Where the Court extends the time for registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.*

In the English Act also every mortgage or charge created by the company is void as against the liquidators or creditors of the company unless particulars of the said charge are registered within 21 days of their creation or where the property is situated and the charge created outside Great Britain, within the same period as provided in our Indian Sec. 109 A. The charges affected are :—

- (a) a charge for securing an issue of debentures ; or
- (b) a charge on uncalled capital ; or

- (c) a charge created or evidenced by an instrument which if made by an individual would require registration as a bill of sale; or
- (d) a charge on land wherever situate, or any interest therein; or
- (e) a charge on book debts; or
- (f) a floating charge; or
- (g) a charge on calls made but not paid; or
- (h) a charge on a ship or share in a ship; or
- (i) a charge on good-will, patents, trade marks or copyright.

### **Floating-charge**

We have already alluded in brief to the position of debentures giving a floating-charge. According to *Lord Macnaghten*, in the *Govt. Stock Investment Co. v. Manila Ry. Co.*, 1897, A. C. 81, "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes (*Evans v. Rival Granite Quarries Ltd.*, 1910, 2 K. B. 979 see also *Bir Chand v. Messrs John Bros*; A. I. R. 1934 All. 161). His right to intervenue may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." Thus it will be noticed that the floating-charge leaves the company free to deal with its assets until the charge becomes fixed or is crystallised, as when the money becomes payable and the charged takes some step to enforce it, or the company goes into liquidation, or a receiver is appointed. Until that happens, however, the property may be sold or specifically mortgaged. There is however no objection to the creation of a second floatin-

~~charge~~, under powers expressly reserved, over any part of those assets ranking *pari passu* with or in priority to the earlier floating-charge (*In re Automatic Bottlemakers Ltd. Osborne v. Automatic B. Makers*, 1926, 1 Ch. D. 412).

In a Bombay case, *The Bank of Baroda v. H. B. Shivdasani*, 23 Bom. L. R. 689, where a mill company borrowed on the pledge of "all the liquid assets including stock-in-process now or at any time hereafter stored by the company in the godowns and the mill premises" with the condition that the company was not to pledge or otherwise charge or encumber the pledged goods which were kept in a godown, the keys of which were delivered to the lending bank, which lending bank was to sell the goods under certain conditions, it was held that the transaction did not create a floating-charge, but amounted to a mortgage of specific assets with a licence to the company to dispose them in the course of its business subject to prescribed conditions.

It may be added that in interpreting the clauses in the debenture deed laying down the circumstances under which the charge becomes enforceable, the Court, in case of goods dealt in, or required for the purpose of business, will always be inclined to a view against their being treated as a fixed mortgage (*Evans v. Rival Granite Quarries Ltd.*, 1910, 2 K.B. 979. See other cases cited there in judgments of Vaughan Williams; Moulton; Buckley L. Js.).

There are certain creditors who have **priority** over the rights of debenture holders on a floating charge provided they act before the debenture holders take any step to enforce the security e.g. (1) the landlord who distrains for rent due, (2) the creditor who gets a garnishee order absolute, and (3) the judgment creditor who has attached the company's goods and sold them.

We have already seen that the floating-charge must be registered on the same footing as the fixed charge or mortgage. Not only can the company sell away assets on which a floating-charge

by debentures is secured, but in case the business of a company is carried on through means of branches, it can sell the entire business of a complete branch (*Metropolitan Bank of England and Wales v. Vivian and Co.*, 1900, 2 Ch. D. 654). In *re Borax Co.*, 1901, 1 Ch. D. 326, where the memorandum of association of a company authorised amalgamation, union, as well as sale, of all or any part of the company's business or property, as well as the holding of debentures and shares of other companies and the company sold the whole of its property and assets, including the good-will, to a new company, but retained certain securities and in return received from the new company its debenture stock and shares, and further agreed not to carry on any similar business except in conjunction with and for the benefit of the new company, it was held that as the sale was within the powers of the company according to its memorandum, and as the old company had not ceased to exist, the debenture holders' charge was nothing more than a floating security. Thus the principle here enunciated results in this, that, if the company sells the whole of its assets or undertaking, but does not technically cease to exist, the floating debenture holders can claim no right of interference. If the debenture holders wish to prevent their securities from being destroyed by subsequent fixed charges or mortgages being created, they ought to protect themselves by inserting special provisions to that effect in the instrument creating the charge on behalf of debenture holders.

According to *Romer J.*, in *re Yorkshire Woolcombers Association Limited*, 1903, 2 Ch.D. 284, a charge is a floating-charge if it contains the following three elements, *viz.*, (1) if it is a charge on a class of assets of a company present and future, (2) if that class is one which in the ordinary course of the business of the company, would be changing from time to time, and (3) if you find that by the charge it is contemplated that, until some further step is taken by, or on behalf of, those interested in the charge, the company may carry on its business in the ordinary way. If, however, the goods secured by the floating debenture holders are seized by the

Sheriff, the debenture holders can claim priority for the rights of execution creditors (*Davey & Co. v. Williamson & Sons*, 1898, 2 Q.B.D. 194). In this case it was laid down (1) that seizure of the goods by the Sheriff is not dealing with them in the ordinary course of the business, but that it was a compulsory legal process directed against the company; and (2) that the rights of debenture holders, as the goods were validly charged, prevailed against the execution creditors with the payment of debentures. This priority existed not only with regard to the legal, but also the equitable rights. They are thus entitled to say to the Sheriff, "the goods seized are validly charged to us and you cannot sell them to the prejudice of our security." It should however be noted that preferential payments as reserved by Sec. 230 and priority of payments as provided for by Secs. 193 and 218 "refer only to the fund available as assets after the claims of secured creditors are satisfied" (*Raja Bahadur Motilal Shivalal v. The Poona Cotton and Silk Mfg. Co.*, 42 Bom. 215 at p. 220).

### Fixed Charge

With regard to the charge it may be stated that a joint stock company, if it has the power, can mortgage its freehold or leasehold property in the same way as an ordinary person. It can also create a mortgage of its moveable property on the same principle as an individual or a businessman can. In case, however, where a large loan is raised by the issue of debentures, the holders of debentures are also given a fixed charge on some specific property of the company. For this purpose it is usual to have a **trust-deed** prepared, under which the freehold or leasehold property is specifically mortgaged and specially conveyed to trustees on behalf of the debenture holders. The mortgage deed gives powers to the persons named therein as trustees, of acting on behalf of the debenture holders upon emergencies. The deed generally contains detailed conditions and stipulations safeguarding the interests of debenture holders which cannot be done in the case of debentures without a special trust-deed because in the latter case these conditions and

stipulations would have to be endorsed or printed on the back of the debentures, which method hardly provides the requisite scope for inserting details. It must be further noted that when debentures are issued creating a charge, it should be clearly declared that each debenture of the series issued is to rank equally with the others of that series, otherwise the legal position will be that each of the series issued will have priority over those issued later (*Gartside v. Silkstone & N. Coal & I Co.*, 1882, 21 Ch. 762).

When a trust-deed is prepared, that generally gives power to the trustees to appoint **receivers** on the happening of a contingency. The contingencies on which this power is to be exercised are also specifically provided for in the deed. In the absence of such specific powers, application has to be made to the Court for the appointment of a receiver.

The debenture trust-deed creating a mortgage or charge, has of course, to be **registered** (S. 109). The registrar is required to keep with respect to each company a register called the **Registrar's Mortgages and Charges Register**, in the prescribed form for all mortgages and charges created by the company after the commencement of the Act of 1913. This register has to contain the date of the creation, the amount secured by it, brief particulars of property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge. This register is kept open to inspection by any person on payment of a prescribed fee which is not to exceed Re. 1 (S. 112). The registrar then gives a certificate of registration of this mortgage or charge, a copy of which has to be endorsed by the company on every debenture or certificate of debenture stock issued by it (Ss. 114-115). It may further be added that these provisions of the Companies Act do not in any way affect the requirement for the registration of documents under the Indian Registration Act of 1908.

**Besides** this in accordance with the requirements of Sec. 123, every limited company must keep a register of mortgages called the **Companies Register of Mortgages and Charges**, and enter

therein all mortgages and charges specifically affecting the property of the company *and all floating-charges on the undertaking or on any property of the company*, giving in each case a short description of the property mortgaged or charged, the amount of mortgage or charge (except in the case of securities to bearer), and the names of the mortgagees or persons entitled thereto. Failure to comply with the requirements of this section makes every director, manager or officer guilty of it, liable to a fine not exceeding Rs. 500. This register shall be open, at all reasonable times, to the inspection of any creditor or member of the company without fee, and in the case of any other person, a fee not exceeding Re. 1 for every inspection may be charged (S. 124).

★ The trustees on behalf of the debenture holders have to see that the documents of title, if any, on the securities mortgaged with the debenture holders are given to them, and should carefully watch the interests of the debenture holders. They must not allow the security of the debenture holders to suffer in any way, and in case of a breach of any of the covenants of the trust, either through non-payment of interests at the appointed time, or failure to return the capital at the due date, or in any other case as provided for in the terms of the issue, they should act upon the powers reserved to them in the trust-deed.

It is further provided that when a **receiver** is appointed in connection with the power contained in the instrument, the said receiver who has taken possession shall, once in every half year while he remains in possession, and also on ceasing to act as a receiver, file with the registrar an **abstract** in the prescribed form, of his **receipts and payments** during the said period to which the abstract relates, and as soon as he ceases to act as a receiver he must give notice to the registrar to that effect. The registrar then enters such a notice in the register of mortgages and charges (S. 119).

It may be added here that though Sec. 121 of the old Act empowered the registrar to register satisfaction of mortgage on

proof of such satisfaction of the mortgage or charge, this was not done, which caused confusion and made the record unsatisfactory. Now it is laid down that it shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under Sec. 109 within twentyone days from the date of the payment or satisfaction thereof. The registrar on receipt of such intimation must cause notice to be sent to the mortgagee calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded and if no cause is shown order a memorandum of satisfaction to be entered on the register and if required he must furnish the company with a copy of it. If cause is shown the registrar must record a note to that effect in the register, and inform the company that he has done so (S. 121.)

### **Method of issuing secured debentures**

Where the financial credit of the company is exceptionally good, or where debentures are issued temporarily, as for instance, when debentures are issued to a bank for temporary accommodation, a trust-deed specifically mortgaging properties is not issued. The **present day tendency** however, of investors, is to insist on a reliable security even from first class companies; and to meet this public demand it is now common to have a special trust-deed which provides for the conveyance of mortgaged properties to certain selected persons who are appointed trustees on behalf of the debenture holders. In this selection care is taken to see that only those who are likely to command public confidence are chosen. These **trustees** are there to **protect the interests of debenture holders** and in case of default in payment of interest or principal, the debenture holders can, through their trustees, enter and sell the property mortgaged. These trust-deeds besides providing for a specific legal mortgage of certain properties also generally carry a floating-charge on the rest. The deed also provides powers to



trustees to appoint **receivers** as soon as the security becomes enforceable, and also states the powers which these receivers should exercise. Of late the practice of providing for **remuneration** of trustees is also common. The general rules of trust law apply to these trustees, who must act themselves in connection with the duties imposed on them by the trust-deed, and cannot delegate these to others, except so far as the trust-deed specifically permits them to do so. In case of sale of the secured property after payment of the costs of realisation, the receivers will be paid in priority to the trustees as to the costs, expenses and remuneration.

### **Deposit of Debentures**

It is a frequent practice among **bankers** to receive debentures from companies in deposit to secure advances from time to time on current account, and as we have already shown elsewhere, the said debentures will not be taken to be redeemed by reason only of the current account having ceased to be in debit. It should, however, be noted that if a subsequent mortgage is created on the same property mortgaged under the debentures, and the banker has notice of it, he cannot make further advances on the security of those debentures to the prejudice of the later mortgage. On the contrary in case he keeps the current account open and running and the company pays in money, all these amounts paid in by the debtor company will go to reduce the original debt and the rule in what is known as **Clayton's Case**, (1 Mer. 572), will apply (*Florence Deeley v. Lloyds Bank Ltd.*, 1912, A.C. 756). It may be added that the rule would apply in the case of advances on deposit of title deeds of land should the banker make further advances after notice of sale of the land (*London and County Banking Co., Ltd. v. Thomas Ratcliffe*, 1881, 6 App. Cas. 722). The wisest course therefore, from the banker's point of view, is to rule off and close the current account with a view to preserving his claim intact on the original mortgage. A separate current account may be opened for the subsequent payments by the debtor company.

### **Garnishees and Floating Debentures**

If a judgment creditor of the company obtains a garnishee order on a debt owing to the company, he will not get a priority to the floating debenture holders' security if it has been attached. This was held on the ground that the service of a garnishee order *nisi* did not operate as an assignment in equity or amount to a transfer of the debt (*Norton v. Yates*, 1906, 1 K.B. 112). This principle is held to apply even in cases where, after the garnishee order absolute is served, the company honestly and without fraud or collusion issues debentures for valuable consideration which is attached, and the debenture holders would prevail (*Geisse v. Taylor and Hartland*, 1905, 2 K.B. 658).

### **Receiver on Behalf Debenture holders**

When a receiver is appointed on behalf of the debenture holders, and if the property mortgaged includes the business which has been carried on for some time, the receiver will also act as manager, and thus, he will be called a "receiver and manager". In case the receiver wishes to borrow money for the purpose of carrying on this business, he will have to obtain the consent of the Court. The Court will not give its consent unless it is satisfied that the borrowing will result in some sort of profit (*Re Thames Iron Works*, 1912, 28 T.L.R. 273). In case something has to be mortgaged to enable the receiver to borrow, the said mortgage will, of course, create a charge which would have priority to that of the debenture holders.

Besides the trustees appointing receivers according to the terms of the trust-deed, a debenture holder may, on his own initiative, move the Court on behalf of himself and others, for the appointment of a receiver for the care and safety of the property. On the other hand, if express power is given to each debenture holder in his own debenture, the debenture holder can himself appoint a receiver, though of course, if he gets a receiver appointed by the Court the said receiver has to act under the orders of the

Court. When this receiver is appointed on behalf of debentures secured by a floating-charge, or possession is taken by or on behalf of these debenture holders of property subject to the charge, and if the company is not at the time in the course of being wound up, the receiver shall forthwith pay off all preferential debts out of the assets in his hands in priority to the claims of debenture holders (S. 129).

In the first place, *i.e.*, where the debenture holders appoint a receiver on their own, either acting on the special powers reserved in the instrument which has created a special mortgage in their favour, or on the powers given to them expressly in each separate debenture, the receiver shall be the agent of the debenture holders. If on the other hand, the Court appoints the receiver, the receiver is the agent of the Court, and he acts for the benefit of the persons interested in the assets. In *Moss Steamship Co., Ltd. v. Whinney*, 1912, A. C. 271, Lord Mersey said in this connection that "Mr. Whinney (meaning the person who was appointed the receiver by the Court) was a receiver and manager appointed by the Court; he was not appointed by the debenture holders, although, no doubt, he was appointed at their instance; nor was he appointed by the company. He was agent for neither the one nor the other, and, therefore, could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The debenture holders could certainly not be sued upon it, for they, as a body, never had power to carry on the business or to contract in relation to it, nor could the company be sued upon it, for they had ceased to be able to make any contract by an agent or otherwise. Thus no question of *ultra vires* arises. Mr. Whinney was merely an officer of the Court, directed by the Court, and by the Court alone, to do a certain thing namely, to carry on the business of Ind. Coope & Co., Limited, in the ordinary way, until such time as the Court might otherwise direct. An obligation was placed on him of making the contracts which might be necessary for so carrying on the business, and annexed to that obligation was a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur. If he

were to make contracts not necessary for the carrying on of the business, as, for instance, if he were to buy an excessive quantity of malt or if he were to sell an unduly large quantity of beer, so as to cripple the business, he would be personally liable on the contract, and when he came to pass his accounts, the Court might refuse him any indemnity out of the assets in respect of the liabilities he had thereby incurred, and might also condemn him in damages for the loss resulting to the business in carrying out the contracts. It would not be for the persons contracting with him to inquire whether the contracts were such as came within the ordinary course of the business. Mr. Whinney, who alone could ascertain whether they were so or not, would have to take the risk of making a mistake in that connection. This was the position of Mr. Whinney with regard to the company of which he was appointed receiver and manager and with regard to third parties with whom he might contract." From this it is clear that the **receiver** in such a case, *i.e.*, where **appointed by the Court, is an officer of the Court**, is there to carry out the directions of the Court and is not bound in any way either by the debenture holders or by the company.

The **Court may appoint a receiver** in the following cases:—

- (1) If the principal amount has become payable, or
- (2) If the company is wound up, or
- (3) If the security is in jeopardy.

In one case, *In re Glyncorrwg Colliery Company Ltd.*, 1926, 1 Ch. D. 951, a receiver was appointed who carried on business under the directions of the Court until the company's colliery was closed down. Thereafter the usual order in a debenture holder's action was made, but when the assets were got in, it was found that they were insufficient to pay the costs of the first debenture holder for moving the Court, the costs and remuneration of trustees, receiver's remuneration, etc. The Court held that the assets were applicable as follows; (1) costs of realisation; (2)

costs including remuneration of the receiver ; (3) costs, charges and expenses of the debenture trust-deed including the trustee's remuneration; (4) the plaintiff's costs of action ; (5) preferential creditors ; and (6) the debenture holders.

Again, where under a debenture deed the debenture holder had appointed a receiver to carry on the business of the company, the authority of the receiver was declared to have been determined as to that on a voluntary winding up following such appointment, and on all contracts made thereafter the receiver was made personally liable (*Thomas v. Todd*, 1926, 2 K.B. 511).

### Re-issue of redeemed debentures

Before our Act of 1913 and the English Companies Act of 1907 the law was in a very unsatisfactory condition as to the re-issue of debentures, as the company after it had once paid off its debentures or any part of them, could not keep them alive or re-issue them, nor could it issue fresh debentures with rights ranking *pari passu* with the holder of the original series unless the terms of original issue authorised this to be done. This caused great hardship because the practice of borrowing on debentures from bankers and others is most common among companies, particularly trading companies, with the result that the law was amended by Sec. 15 of the English Act of 1907, re enacted in Sec. 104 of 1908 which was bodily taken up in our Sec. 127 of the Indian Companies Act of 1913. This section is now incorporated in Sec. 75 in the English Companies Act of 1929.

Now, where either before or after the commencement of this Act (thus making the law retrospective as well as of future application, a company has redeemed debentures which it had issued previously, it can, with certain exceptions, keep them alive for the purpose of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures, or by issuing other debentures in their place, and

upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

The **two exceptions** are where (1) the articles or the conditions of issue expressly otherwise provide or (2) the debentures have been redeemed in pursuance of any obligation on the company so to do, not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns.

The first point is easy to follow, *viz.*, when the articles expressly forbid such a re-issue. In the second case, say where the agreement is that so many per year shall be paid off, they cannot be re-issued. "Not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns" covers the case where the debenture has been deposited to cover a temporary advance and the loan is called in. Here the company may keep it alive and re-issue.

### **Interest on debentures**

The debenture **deeds** always **provide** for the payment of interest at a certain rate and at fixed interest, failing which the common law rule of no interest being payable on a debt unless expressly agreed will apply. We have already seen above that failing the mention of a place of payment, the company would have to pay interest to the holder at his place. Sometimes, though rarely, interest is by special contract made payable only out of profits. These are called "**income bonds**" and in their case nothing can be taken to the reserve fund until all interest due is paid (*Heslop v. Paraguay C. Ry.*, 1910, 54 Sol. J. 234).

### **Transfer of Debentures**

In case of **debentures to bearer** there is of course no difficulty as to transfer, because they are **transferable by delivery**, but where the debentures are **registered debentures** and the certificates are issued in the names of the holders, which names are

registered in a special register of debenture holders at the office of the company, they are **transferable only** in the manner specified in the conditions endorsed on them or according to the **terms and conditions** to be found in the debenture trust-deed. Usually, these conditions lay down that transfer of the debenture must be in writing under the hand of the registered holder or his personal representative. This transfer, the regulation requires, must be registered at the registered office of the company duly stamped and accompanied with a fee of one rupee, or such other fee as may be fixed, and such evidence of identity or title as the company may reasonably require. The company hereafter registers this transfer in its register of debenture holders. The regulation also provides that the instrument of transfer shall be in such form as the company shall from time to time prescribe that the transfer shall be retained by the company.

The company's responsibility in connection with the registration of debentures is great, particularly where the transfer happens to be forged. After a resolution for voluntary winding up has been passed, a debenture holder who is also a shareholder, can only assign the debenture subject to future calls (*In re China Steamship Co.*, 1869, 7 Eq. 240, *Partridge v. Rhodesia Goldfields*, 1910, 1 Ch. 239); but where the debenture is transferable free from equities, this will not arise. A transfer of debentures made by one of several joint holders in which the holder signed his own name and forged the signature of his joint holders was held to be void and ineffective (*Cottam v. Eastern Counties Ry. Co.*, 1860, 1 Joh. & H. 243). The practice in the office of the company as to transfer of debentures is almost along the same lines as in the case of shares and the secretary or officer in charge of this department has carefully to go through similar formalities as in the case of a transfer of shares. Debentures can be transferred in blank unless the regulations of the company require these transfers to be under seal (*Hibblewhite v. McMorine*, 1840, 6 M. & W. 200). This is for the simple reason that a deed must be complete before it is executed.

### Exchange of Debentures for Shares

There is **no objection** in connection with this exchange so far as debentures are not issued at a discount and are exchanged at the full value. Non-compliance with these two conditions would be an illegal process, as the company would not get full value for its shares and it would be taken by the Court as an excuse to issue shares at a discount in disguise (*Moseley v. Koffyfontein Mines*, 1904, 2 Ch. 108). In another case it was held that where a bonus is to be given to debenture holders out of profits and there are no profits, fully paid shares cannot be issued in lieu of the bonus (*Bury v. Famatina Development Corporation*, 1910, A.C. 439). As this issue of shares against debentures amounts to an issue of shares for a consideration other than cash, a **contract in writing** would be necessary with the certified copy filed with the registrar.

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## CHAPTER XII.

### BANKING COMPANIES

The **Indian Companies (Amendment) Act, 1936**, deals with Banking Companies **specifically** in a special part of the Act, *viz.*, Part XA owing to "the peculiar nature of the business and the different interests which require protection" The sections under this part aim at the protection of depositors, restriction of banking companies as far as possible to banking transactions only, ensuring of the maintenance of the proper reserve fund with a proper cash reserve, restrictions on granting of loans to officers including directors and auditors, providing of protection to the banks themselves in the nature of moratorium, prevention of managing agencies in the organisation of banking companies, etc. They also provide against the launching of mushroom banking companies with inadequate finance.

The Act has boldly defined in some detail the "Banking Company" and within the fold of the said definition has extensively enumerated the various functions which such banking companies can perform as given hereunder.

#### Definition

A "**Banking Company**" is **defined** by S. 277 F as a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely:—

(1) The borrowing, raising or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundis, promissory notes, coupons,

drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, travellers, cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes, the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds, the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others; the negotiating of loans and advances, the receiving of all kinds of bonds, scrips or valuables on deposit, or for safe custody or otherwise, the collecting and transmitting of money and securities.

(2) Acting as agents for Governments or local authorities or for any other person or persons, the carrying on of agency business of any description other than the business of a managing agent including the power to act as attorneys and to give discharges and receipts.

(3) Contracting for public and private loans and negotiating and issuing the same.

(4) The promoting, effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue.

(5) Carrying on and transacting every kind of guarantee and indemnity business.

(6) Promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new, and developing or forming the same either through the instrumentality of syndicates or otherwise.

(7) Acquisition by purchase, lease, exchange, hire or otherwise of any property moveable or immoveable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realization of any securities held by the company or to prevent or diminish any apprehended loss or liability.

(8) Managing, selling and realising all property moveable and immoveable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims.

(9) Acquiring and holding and generally dealing with any property and any right, title or interest in every property moveable or immoveable which may form part of the security for any loans or advance or which may be connected with any such security.

(10) Undertaking and executing trusts.

(11) Undertaking the administration of estates as executor, trustee or otherwise.

(12) Taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company.

(13) Establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object.

(14) The acquisition, construction, maintenance and alteration of any buildings or works necessary or convenient for the purposes of the company.

(15) Selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company.

(16) Acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section.

(17) Doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.

A proviso is added to S. 277F by the Indian Companies (Amendment) Act, 1942 under which any company which uses as part of the name under which it does business, the word "bank" "banker" or "banking" is a banking company though the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, is not, or is not shown to be, the principal business of the company.

### **General Amendments of Law**

No company which is formed after the commencement of the Indian Companies (Amendment) Act of 1936, i.e. after the 15th day of January 1937, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word "Bank", "Banker" or "Banking" shall be registered under the Act unless its Memorandum limits the objects of the company within the folds of the foregoing definition. The Act goes further and lays down that no banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act of 1936, carry on any form of business other than those specified in the definition. Provided that the Central Government may by notification in the "Official Gazette" specify, in addition to the businesses set forth in the said definition, other forms of business which it may be lawful under this section for a banking company to engage in (S. 277G). Thus for all banking companies two years limit is given within which they have to adjust their position to fall within the definition of the Act.

### **Managing Agents**

It is provided by S. 277H that on or after the expiry of two years from the commencement of the Amending Act of 1936, a banking company **cannot** have a managing agent **other than a banking company**.

A new section viz, S. 277 IHH is added by the Amendment Act of 1944 by which a banking company, whether incorporated in or outside British India, carrying on business in British India, is prohibited from employing or being managed by a managing agent or by any person whose remuneration or part of whose remuneration consists of any share in the profits of the company or by any person having a contract with the company for its management for a period exceeding five years at any one time. The contract may be renewed after the expiry of the period of five years for another period of five years if and as often as the directors deem fit.

### **Commencement of Business**

A banking company incorporated on or after 15th January 1937 cannot start business unless shares have been allotted to an amount sufficient to yield a sum of at least Rs. 50,000 as working capital, and unless a declaration, duly verified by affidavits, signed by the directors and managers that such a sum has been received by way of paid-up **capital** has been filed with the Registrar (S. 277I).

### **Conditions for Carrying on Business**

It is further provided that a banking company, whether incorporated in or outside British India, if incorporated on or after 15th January 1937, shall not carry on business in British India **unless** (1) its subscribed capital is at least half the amount of its authorised capital, and the paid up capital is at least half the subscribed capital and (2) its capital consists of ordinary shares only, or ordinary and such preference shares as may have been issued before the commencement of the Indian Companies Act, 1944 only, and (3) the voting rights of all shareholders are strictly proportionate to

the contributions made by the shareholder, whether preference shareholder or an ordinary shareholder to the paid up capital of the company.

### **Prohibition of Charge on Unpaid Capital**

A banking company is now prohibited from mortgaging or charging its unpaid capital and if such a charge is created it is void (S. 277J).

### **Reserve Fund and Cash Reserve**

Every banking company, after the commencement of the Amendment Act of 1936, must create, out of the profits declared each year, a **reserve fund**, before any dividend is declared, by transferring from profits a sum equivalent to not less than **20 per cent** of such profits to the reserve fund until the amount of the reserve fund is equal to the paid up capital. The amount standing to the reserve fund of a banking company must be invested in Government securities or any securities mentioned or referred to in Sec. 20 of the Indian Trusts Act, 1882 or deposited in a special account to be opened by the company for the purpose in a scheduled bank. This provision as to investment of reserve funds does not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act of 1936 till the expiry of two years from the commencement of the said Act (S. 277K).

Over and above this all banking companies in India must maintain, by way of **cash reserve**, a sum equivalent to at least **1½ per cent** of their total liabilities and **5 per cent** of their demand liabilities and must file with the Registrar before the 10th day of every month a statement of the amount so held on the Friday of each week of the preceding month with particulars of the demand liabilities of each such day. This requirement, however, is not to apply to scheduled banks as defined in Sec. 2 (e) of the Reserve Bank of India Act, 1934. If any **default** is made in connection with the maintenance of a cash reserve,

or in complying with the requirements of section 277G, 277H, 277HH, 277I, 277J or 277M, the directors and officers knowingly and wilfully a party to the default are liable to a fine not exceeding five hundred rupees for every day during which the default continues and in case of default as to the filing of the statement with the Registrar, to a fine not exceeding one hundred rupees for every day during which the default continues (S. 277L).

### **Subsidiary Companies**

A banking company is also prohibited from forming or holding the shares in any subsidiary company except its own subsidiary formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as Executor and Trustee, or otherwise, and such other purpose as set forth in the definition of a banking company under the Act (S. 277M).

### **Power of Court to stay Proceedings**

In the case of banking companies which are temporarily unable to meet their obligations, the Court has power to make an order staying the commencement or continuance of actions and proceedings against it for a fixed period of time on such terms and conditions as the Court may think fit. This is done with a view to protect a banking company against an unexpected run in times of difficulties. It will of course only be done after proper investigation is made by the Registrar as to the financial condition of the bank, after examining the books and documents and having reported to the Court (S. 277N)

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## CHAPTER XIII.

### ACCOUNTS, PROFITS, RESERVES AND DIVIDENDS

The Indian Companies (Amendment) Act of 1936 (following the English Act of 1929) lays down in section 130 that every company shall cause to be kept **proper books of account** with respect to:—

(1) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place,

(2) all sales and purchases of goods by the company, and

(3) the assets and liabilities of the company.

The books of account must be kept at the **registered office** of the company or at such other place as the directors think fit, and shall be **open to inspection by the directors** during business hours.

When a company has a branch office, it is provided that it shall be sufficient if proper books of account relating to the transactions effected at the branch office are kept at the office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place as the directors think fit.

In the case of a company managed by a managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company complying with these requirements, are liable in respect of such offence to a fine not exceeding rupees one thousand. It will here be noticed that where the managing agents are in management of the company the law makes them solely responsible for seeing these requirements being complied with and



the directors are made responsible only in cases of companies worked without managing agents.

### **Annual Balance Sheet and Profit and Loss Account**

The directors of every company must at some date not later than eighteen months after the incorporation of the company, and subsequently once at least in every calendar year, lay before the company in general meeting a balance sheet and profit and loss account, or in the case of a company not trading for profit, an income and expenditure account for the period. This account has to be prepared in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or, in the case of a company carrying on business or having interests outside British India, by more than twelve months. However the registrar may for any special reason extend the period by a period not exceeding three months (S. 131 (1)). Thus it will be seen that now a limit is laid down beyond which accounts cannot be allowed to fall in arrears as was the case in some Indian companies against which there was much agitation from the shareholders and investors.

The balance sheet and the profit and loss account or income and expenditure account shall be **audited** by the auditor of the company as provided by the Act, and the **auditors' report** must be attached thereto, or there must be inserted at the foot thereof a reference to the report. This report must be read before the company in general meeting and shall be open to inspection by any member of the company (S. 131 (2)). A **copy** thereof and of the profit and loss account or income and expenditure account so audited, must be **sent to** the registered address of **every member** of the company at least fourteen days before the meeting at which it is to be laid before the members of the company. A copy of these must also be deposited at the registered office of the company for the inspection of the members of the company during a period of at

least fourteen days before that meeting (S. 131 (3)). This **compulsory circulation** of a profit and loss account or income and expenditure account has now been introduced and made compulsory under the Amendment Act of 1936, prior to which it was optional. The last requirement of sending copies of the accounts and the balance sheet do not apply to a private company.

### **Directors' Report**

Besides the above, the directors must now make out and attach to every balance sheet a report with respect of the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically in the balance sheet, or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance sheet (S 131A (1) ). The report may be signed by the chairman of the directors on behalf of the directors if authorised by themselves (S. 131 A (2) ). The provisions of Sec. 130 (3) shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with Sec. 131A.

### **Contents of Balance Sheet**

The Act expects the balance sheet to contain a summary of the property, assets and liabilities of the company, giving such particulars as will disclose the general nature of the said liabilities and assets, together with a statement as to how the value of the fixed assets has been arrived at. The form in which the balance sheet has to be made out is indicated by the Act in a **Form** marked "**F**" in its third schedule. Form F has been **altered** by the Amendment Act of 1943, **exempting banking companies** from having to disclose their bad and doubtful debts for which provision was made to the satisfaction of the auditors.

The profit and loss account must include particulars showing the total of the amount paid whether as fees, percentages or other-

wise to the managing agents, if any, and the directors respectively, as remuneration for their services and where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emolument received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, must be shown in a note at the foot of the account or in a statement attached thereto (S. 132).

### **Authentication of Balance Sheet**

The balance sheet, and profit and loss account or income and expenditure account in the case of a banking company, must be signed by the manager or managing agent (if any) and where there are more than three directors of the company, by at least three of these directors and when there are not more than three directors, by all the directors. In the case of any other company it must be signed by two directors or, where there are less than two directors, by the sole director and by the manager or the managing agent (if any) of the company (S. 133 (1) ).

When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required as above, the balance sheet and profit and loss account or income and expenditure account shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance sheet and profit and loss account or income and expenditure account a statement signed by such directors or director explaining the reason for non-compliance with the above provision (S. 133 (2) ).

In case there is any **default** in laying before the company or in issuing a balance sheet and profit and loss account or income and

expenditure account as required by Sec. 131 or if any balance sheet or profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under Secs. 131, 132, 132A and 133 the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees (S. 133 (3) ).

### **Copies to be Forwarded to Registrar**

Three copies, signed by the manager or secretary, of the balance sheet, and profit and loss account or the income and expenditure account as the case may be, in the case of **public companies only**, have to be filed with the registrar of joint stock companies, at the same time as the copy of the annual list and summary, after they are laid before the general meeting. If the general meeting before which the said balance sheet is laid does not adopt it, that fact and the reason for such non-adoption must also be annexed to the balance sheet filed with the registrar (S. 134).

### **Statement to be Published by Certain Companies**

In the case of limited banking companies or insurance companies, or a deposit, provident or benefit society, they shall, before the commencement of the business, and also on the first Monday in February, and the first Monday in August during every year, in which business is carried on, make a statement in the **form** marked "**C**" in the third schedule, or as near thereto as circumstances will admit. A copy of this statement together with a copy of the last audited balance sheet laid before the members of the company, has to be displayed in the registered office of the company in a conspicuous place, as well as in branch offices, or places where the business of the company is carried on, until the display of the next statement. Every creditor or member of the company shall be entitled to get a copy of this statement on payment of a fee not exceeding eight annas. Non-compliance entails a fine of fifty rupees

for every day, on the company and every officer of the company, knowingly and wilfully permitting it.

This requirement does not apply to those life insurance or provident insurance societies to which the provisions of the Indian Life Assurance Companies Act of 1912, or of the Provident Insurance Societies Act of 1912 apply (S. 136).

### **Members' Right of Inspection**

Table "A", as we have seen, provides for the inspection of books of account by members, who are not directors, but the right of determination as to the time, the extent and conditions under which they shall be so open is left to the directors (Cl. 105). This is reasonable because it is impossible, as well as undesirable, to reserve unlimited powers to ordinary members of the company in this regard. Of course, the register of members, as well as that of mortgages, is open to their inspection according to the provisions of Secs. 36 and 124, respectively. This right does not include that of access to the minute books in which the minutes of the proceedings of directors' board meetings are recorded. The members are also entitled to get a copy of the register of members, or of the register of mortgages on payment of a small fee.

It should however be noted that a shareholder under the Companies Act itself has no right of inspecting the company's books of account himself, unless the **articles** give him such right. **Table "A"** Clause 105 suggests a right which may be given by the articles and which runs as follows :—

"The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member, (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in General Meeting"

The Indian articles used in regard to this point are usually framed in the following manner :—

"The managing agents under the control of directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations, the accounts and books of the company or any of them shall be open to the inspection of members (not being directors) and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by a resolution of the company in General Meeting."

Under the **common law**, however, a shareholder's right is restricted to a definite right or object of his own (*Bank of Bombay v. Suláiman Sonji*, 1908, 32 Bom. 466). However, where a member is given the right to inspect accounts by the articles, he may get this done by a skilled agent, such as an accountant, provided that the agent is not objectionable to the company on personal grounds and that he gives an undertaking not to disclose the information he gets through such inspection to anyone but his own client or principal (*Dodd v. Amalgamated Marine Workers Union*, 1924, 1 Ch. 116). If, however, a **winding up** has commenced, the inspection can only be obtained by an order of the Court under Sec. 241. Of course a director can inspect the books and documents of the company at any time (*Burn v. London and South Wales Coal Co.*, 1890, 7 T. L. R. 118).

### **Holding (Parent) Companies and Subsidiaries**

A very recent and interesting feature of the development of the company system in England and America as well as in this country, is the advent of holding or parent companies with their subsidiaries. The system, though of recent growth, has rapidly developed. Under the system, the holding company acquires a sufficient number of shares in other companies called the subsidiaries with a view to exercise a controlling interest in the affairs of the subsidiaries. The result is that, though the parent company and each of its subsidiaries remain so many separate entities in law, the whole organization is, in practice, in most cases, working under the central policy as determined by the management of the parent or holding company.

These companies no doubt can be, and are, worked with great advantage if properly directed, particularly in cases where a parent (holding) company wishes (1) to separate one or more of its departments of business into so many subsidiary companies, thereby creating a separate good-will or (2) to purchase a business similar to its own and work it separately with a view to get rid of adverse competition or (3) to obtain a controlling interest in other concerns by purchasing their shares and using them as agencies, etc., or (4) to invest capital in profitable enterprises or (5) to open out branches at different locations in the form of independent entities and thus form separate companies for each location. For instance the Bombay Trading Co., may start a branch office in East Africa and call it, The Bambay Trading Co., (East Africa) Ltd., and incorporate it in East Africa according to the Companies Act of that place.

The weakness of this system lies in the power which the directors or managing agents of the companies acquire by which they are, if so inclined, in a position to mislead the shareholders and manipulate any subsidiary company with disadvantage to the shareholders of the parent company. This manipulation generally takes the form of entering into inter-company transactions with the predominant idea of concealing from the public and shareholders of the parent company certain transactions or the true state of affairs, or with the idea of so manipulating as to increase the profits of the company ficticiously on which the management by way of remuneration as commission may depend by transferring or pretending to sell to a subsidiary one or more of the least paying departments, so that the losses caused by such departments, may become the losses of the subsidiary with a corresponding artificial increase in the profit of the parent company. The English Act of 1929 tackled this question on the recommendations of the Greene Commission of 1924-26 by providing that a holding company must set out separately in its balance sheet any assets consisting of shares in or amounts owing from a subsidiary company (or subsidiaries) distinguishing shares and indebtedness.

Where a holding company is indebted to a subsidiary or subsidiaries, the aggregate amount must be separately disclosed in its balance sheet and details need not be displayed. The holding company is required to annex to its balance sheet a duly signed statement stating how the profits and losses of a subsidiary or subsidiaries have been dealt with in its accounts and in particular how and to what extent (1) provision for the losses of the subsidiaries has been made in the accounts of the holding company or in those of the subsidiaries or in both and (2) the losses of a subsidiary or subsidiaries have been taken into account by the directors of the holding company in arriving at the profits and losses of the holding company as disclosed in its accounts. These are also required to be stated in the aggregate. When the auditor's report is qualified the Act requires particulars of the qualification also to be stated. Our Indian Companies (Amendment) Act 1936, has taken up this question in greater detail and has gone further even than the English enactment taking advantage of the experience of the working of the subsidiary and holding companies both in English and in India since the time when the Greene Commission Report was written.

### Definition of Holding Company

Section 2 (2) of the Indian Act defines a holding company as follows :—

*Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and*

*(a) the amount of shares so held is, at the time when the accounts of the holding company are made up, more than fifty per cent of the issued share capital of that other company or such as to entitle the company to more than fifty per cent of the voting power in that other company, or*

*(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust-deed or by*



*virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,*

*that other company shall be deemed to be a subsidiary company within the meaning of the Act and the expression subsidiary company' means a company in the case of which the above conditions are satisfied and includes a subsidiary of such company.*

*Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that company is a subsidiary company, be taken of the shares so held (S. 2 (2) ).*

### **Balance Sheet of Parent Companies**

When a holding company holds shares either directly or through a nominee in a subsidiary company or in two or more subsidiary companies, to the balance sheet of the holding company shall be annexed the last audited balance sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the person by whom, in pursuance of Sec. 133, the balance sheet of the holding company has been signed stating how the profits and losses of the subsidiary company, or where there are two or more subsidiary companies, the aggregate profits and losses of those companies have been dealt with for the purpose of the accounts of the holding company. It should be particularly shown how and to what extent (1) provision has been made for the loss of a subsidiary company or of the holding company or of both, and (2) losses of the subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the parent company as disclosed in its accounts. However, it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amo-

unt of any part of any such profits or losses which has been dealt with in any particular manner. An investment company, *i.e.* a company whose principle business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company, simply because part of its assets consists in fifty-one per cent or more of the assets of another company (S. 132A (1)).

In a case where the auditors' report of a subsidiary company on the balance sheet of the company does not state without qualifications that the auditors have obtained all the information and explanation they have required and that the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanation given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance sheet of the holding company shall contain particulars of the manner in which the report is qualified (S. 132A (2)).

For the above purposes, the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or if there are no such accounts of such subsidiary company available at the time when the accounts of the holding company are made up, the profits and losses shown in the last previous accounts of the subsidiary company which become available within that period (S. 132A (3)).

It is further provided that where for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement required as above, the directors who signed the balance sheet shall so report in writing and the report shall be annexed to the balance sheet in lieu of the statement (S. 132A (4)).

The holding company may by a resolution authorise its representatives named in the resolution to inspect the books of accounts

kept in accordance with Sec. 130 by any subsidiary company, and on such resolution being passed those books of accounts shall be open to inspection by those representatives at any time during the business hours. The rights conferred by Sec. 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of the subsidiary company (S. 132A (5) and (6)).

Thus the new section of the Indian Companies (Amendment) Act of 1936, now makes it compulsory that the balance sheet and profit and loss account, together with the auditors' report of the subsidiary company, should be circulated along with the accounts of the holding company. This was laid down in response to a very strong demand from the Bombay Shareholders' Association and the investors for complete disclosure of the accounts of the subsidiary companies. The Select Committee also agreed with this view and laid down that "we also consider that when the holding company is a public company, subsidiary companies even if private companies should not enjoy exemptions from the provisions of Secs. 83A, 86D, 87C, 87D, 91B, 91D, 144 (1) and 144 (5) Clause 3."

### **Profits**

In ordinary commercial parlance, "**profit**" means the excess of revenue of the current year over the current year's expenditure, less the loss sustained by fixed assets through wear and tear and depreciation. This is not exactly the legal view however. It is, of course, a settled doctrine in any law that **profits only should be utilised in the payment of dividend**, and that it is **illegal to pay dividends out of capital**. Where the directors pay dividends out of capital, they have to make good the amount so paid (*In re Oxford Benefit Buildings and Investment Society*, 1887, 35 Ch. D. 502). In this case it was also decided that "**realised profits**" as provided for in the articles must be taken in its ordinary commercial sense as meaning at least "**profits tangible for the purpose of division**," and not estimated profits. In

*Lucas v. Fitzgerald*, 1905, 20 T.L.R. 16, the directors who were absent at the meeting when the interim dividend was declared, but were present at the subsequent meeting where it was confirmed, were held not liable because it was held that they "must be taken to have believed that a proper investigation that justified the payment had taken place and there was nothing to suggest to them that a perfectly just expectation of profits had not been formed." The directors, however, who pay dividends out of capital have a right to recover the amount by way of indemnity from those of the shareholders who at the time they took the dividend knew that it was so paid (*Maxam v. Grant*, 1900, 1 Q.B. 88). Such shareholders cannot even maintain an action against the directors to compel them to replace this amount (*Towers African Tug. Co.*, 1904, 1 Ch. D. 558).

Under company law, however, according to *Moulton, L.J.*, in *Re Spanish Prospecting Co.*, 1911, 1 Ch. D. 92, profits are to be ascertained on the following basis, *viz.*, "if the total assets of the business at the two dates be compared, the increase which they show at the later date, as compared with the earlier date, (due allowance, of course, being made for any capital introduced into or taken out of the business in the meanwhile), represents in strictness the profits of the business during the period in question." In the course of the judgment, his Lordship admits that this legal conception of profits as applied to joint stock companies is very difficult in practice, and therefore, in the usual profit and loss statement prepared in the business world this legal definition is seldom strictly followed. Thus, for example, a rise in the value of fixed assets such as business premises is seldom taken into account in connection with the profit and loss statement. In short, the tendency of the business world according to his Lordship, is rather inclined to understate than overrate the profits. In strict law, however, as long as the dividends are not actually paid out of capital, but are declared out of profits as defined by *Moulton L.J.*, the directors will be within their rights, unless of course, the articles otherwise specifically provide. It may be further added that, on the question

whether fixed capital loss during one year should be made good during the subsequent years out of profits, before a dividend can be declared, there are conflicting decisions. The earlier view of law was that such a provision was not necessary to be made, but in *Dovey v. Cory*, 1901, A.C. 477, some doubt was thrown on this proposition, though no definite view was expressed overruling the prior cases, as it was not necessary for the purpose of that particular case. Here, Lord Davey expressed himself as follows: "But I desire to express my dissent from some propositions of law which were laid down in the Court of Appeal and upon which your Lordships thought it right to hear the respondent's counsel. The learned judges seem to have thought that a joint stock company, incorporated under the Companies Acts, may write off to capital, losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed out-goings, pay dividend out of such excess without making up the capital account. If this proposition be wellfounded, it appears to me that a company whose capital is not represented by available assets need never trouble itself to reduce its capital . . . . . in order to enable itself to pay dividends out of current receipts." This is, however, a passing opinion and it is unfortunate that no definite ruling was given on this point. Thus in *Ammonia Soda Co. v. Chamberlain*, 1918, 1 Ch. D. 266, it was held that the observation of their Lordships in *Dovey v. Cory* as cited above, cannot be considered as having overruled or qualified the previous decisions of the Courts of Appeal, and therefore the Court was bound to follow these decisions. In this case *Swinfen Eady, L.J.*, said that "The Companies Acts do not impose any obligation upon a limited company nor does the law require, that it shall not distribute as dividend the clear net profit of its trading, unless its paid up capital is intact or until it has made good all losses incurred in previous years." The three cases cited above by his Lordship in support of this proposition were:—

(1) *Lee v. Neuchatel Asphalte Co.*, 41 Ch.D. 1, where it was held to the effect that the company can, if so empowered to do

by its articles, distribute as dividend all trading profits without making good the depreciation of the fixed assets.

(2) *Verner v. General and Commercial Investment Trust*, 1894, 2 Ch. 239, where also it was held that the trust company, or any other company under the Companies Acts is not prevented from declaring and paying dividend, without having made good the lost part of its capital

(3) *In Re. National Bank of Wales*, 1899, 2 Ch. D. 629, where *Lindley, M. R.*, said "it is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact."

In the same case (*Ammonia Soda Co.*) *Swinfen Eady L.J.*, distinguished "fixed" capital from "circulating" capital thus:—"The distinction between 'fixed' capital and 'circulating' capital is not to be found in any of the Companies Acts; it appears to have first found its way into the Law Reports in *Lee v. Neuchatel Asphalte Co.*, 1889, 41 Ch. D., where *Lindley, L.J.*, in his judgment adopted the expression which had been used by Sir Horace Davey in argument, derived from writers on political economy. It is necessary to consider the sense in which the expressions 'fixed capital' and 'circulating capital' were used in that case and in *Verner's Case*, 1894, 2 Ch. 239. **What is fixed capital?** That which a company retains, in the shape of assets upon which the subscribed capital has been expended and which either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits. A trust company formed to acquire and hold stocks, shares and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company acquiring or erecting works with machinery and plant is an instance of the latter. In these cases the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. **What is**

**circulating capital ?** It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it, and with the goods bought by it, intending to receive back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest. He retains, more or less permanently, bank premises in which the money invested becomes fixed capital. It must not, however, be assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated. This purpose may be changed as often as considered desirable, and as the constitution of the bank may allow. Thus bank premises may be sold, and conversely the money used as circulating capital may be expended in acquiring bank premises. The forms 'fixed' and 'circulating' are merely terms convenient for describing the purpose to which the capital is for the time being devoted when considering its position in respect to the profits available for dividend. Thus, when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from receipts, before the amount of any profits can be arrived at. This is quite a truism, but it is necessary to bear it in mind when considering what part of current receipts are available for division as profit."

This, of course, is the law at present; but in view of the House of Lords' attitude in *Bovey v. Cory*, 1901, A. C. 477, it is wise for directors and company managers to see that proper provi-

sion is made out of profits for the purpose of writing off or replenishing wasting assets. They should also refrain from declaring dividends before making due provision for losses, either out of profits, or through the simple expedient of reducing the capital of the company to the extent for which it is unrepresented by the assets, of course after obtaining the requisite consent of the Court in that regard. This should be done particularly in cases where the amount of lost capital is so heavy that its replacement by profits seems difficult.

According to the late Sir Francis Gore-Brown, K. C., in his excellent book entitled "Hand-book on the Formation, etc., of Joint-stock Companies" (26 Edn. p. 400): "It is impossible to state any general proposition upon this point, with certainty, but the following rules are suggested for the guidance of directors:—

- (a) "Every company, as far as possible, provide for unexpected losses by creating a reserve fund.
- (b) "Provision should be made out of profits for replacing depreciation on wasting property, such provision being measured by the length of time during which the property may reasonably be expected to last; and in like manner sums should be set aside to allow for debts proving bad.
- (c) "Accidents such as ordinarily occur should be made the subject of insurance, the premiums being paid out of profits, or a sum carried to an insurance fund.
- (d) "If a loss occurs, and the provision made in previous years, is not sufficient to make good the amount, it may still be that the House of Lords will hold that no dividends should be paid until the loss is made good, although there is a strong ground for arguing that under such an Article as Cl. 80 of the original Table A the loss might be spread over several years, the company paying a reduced dividend meanwhile.

"If the loss is large, so that it cannot be made good out of profits within a reasonable period, the capital should be reduced with the sanction of the Court."

### **Profits made Prior to Incorporation**

We have dealt with the question of profits made by a company in the course of its business, but it frequently happens that when a



company takes over a going business from a date prior to the date of its incorporation, profits are made within the interval and they have to be properly treated in the accounts. Frequently under the agreement, arrangements are made to the effect that the company is entitled to receive this profit, and not the vendor. If that is the case, as is usual in modern agreements, such profits are not available for dividend, on the simple ground that a company cannot legally earn profits before its existence, and a public company cannot do so until it has obtained a certificate entitling it to commence business. Under the circumstances such **pre-incorporation profits are treated as capital profits and transferred to a special or capital reserve fund**, as distinct from general or ordinary reserve fund, because the latter is a fund created out of profits and is virtually an accumulation of profits. This distinction between the two types of reserves has to be maintained, as otherwise, if these capital profits are mixed up with the general reserve fund accumulation of the working profits and paid out as dividend, the directors will be liable to refund the money on the footing of having paid dividend out of capital. When the vendor has thus given up his right to pre-incorporation profit intervening between the period of his agreement and actual incorporation of the company, it is usually provided that he should be paid an interest on his purchase amount. In that case this preincorporation profit may be utilised towards the payment of such interest, as a first charge. Thus capital profits may be utilised to make good any depreciation of fixed assets originally acquired by the company, or with a view to writing down the good will, though it is not correct from a purely accountancy standpoint to utilise such profits for writing off preliminary expenses, because it is argued that this course would relieve the new company from the burden, which it should equitably bear, of writing off preliminary expenses out of further profits.

According to the late Professor Dicksee, in his book on "Advanced Accounting", 4th edition, page 98, the **reason** why profits made prior to incorporation should be treated as capital profits is because :—

"In fixing the purchase price the vendor will doubtless have taken into account the probable amount of profits accruing between the date of the sale and the date of completion and will have increased the purchase price accordingly. In order, therefore, to arrive at the true purchase price this loading must be deducted. If the assets acquired by the company include the item of good-will, then some other fixed asset—preferably the most permanent—should be the one to be reduced. It is, however, perfectly legitimate to set off interest on purchase money against accruing profits, with a view to avoiding the necessity of charging against revenue account interest accruing prior to the date upon which the company is entitled to commence business."

In connection with ascertainment of this profit or loss prior to incorporation, it is usual, as far as it can possibly be done, that an actual stock be taken, because by this method alone a very accurate figure of profit or loss can be arrived at. Failing that, the next best course is to ascertain such profits approximately, by dividing the first year's trading into a period prior to incorporation and another subsequent to incorporation, and then apportioning the total profits or losses thus arrived at either according to the time or period, or according to the turnover. The division on the basis of time or period is arrived at by striking a ratio on the footing of the period of time which it bears to the total period of time and thus bringing about a division. If on the other hand an apportionment has to be made on the basis of turnover, then the same method of striking a ratio on the footing of turnover and time has to be observed. It is stated that the latter method of apportionment is more accurate, particularly where there is a seasonal trade. While making this apportionment, care has to be taken to see that the expenditure which relates solely to the company must be charged against the profits subsequent to the date of incorporation, such expenditure being directors' fees, preliminary expenses written off, etc. Some accountants claim that a combination of both these methods would bring about a still more satisfactory result, *viz.*, that the gross profit may be apportioned according to turnover and the expenses apportioned according to time. Where this apportionment brings a loss for the period prior to incorporation, such loss should be added to the good-will; because in reality it amounts to

an increase of the purchase price. In case there is no good-will, a good-will account is recommended to be opened and debited with this loss, or the same may be taken to a suspense account which may be extinguished by capital profits such as premiums on shares or debentures. Ultimately, the wisest course is to write this account off even from the ordinary trading profits, over a period of years or as soon as circumstances would permit, and it should not be allowed to remain as a paper asset on the balance sheet longer than can be helped by circumstances.

### **Divisible Profits**

This is of course the state of law where no specific provision, describing or limiting the profits out of which dividends are to be paid is to be found in the articles, but where such a provision does exist, the **articles** must be carefully considered, before arriving at the decision as to what is the exact figure of divisible profits. Where different classes of shares, such as preference and deferred, are issued, care should be taken to see that the articles clearly lay down the right of each class in connection with the division of profits, in order to avoid unnecessary confusion and litigation. Thus where the articles empower the directors to provide so much of the profits as they think necessary for the creation of a reserve fund, preference shareholders cannot insist on being paid their dividends without such a provision having been made (*Bond v. Barrow Haematite Steel Co.*, 1902, 1 Ch. D. 358). In the same case it was decided that though lost circulating capital must be kept up, it is not absolutely necessary in law to replace loss or depreciation on fixed capital. The other interesting ruling laid down by the learned Judge here (*Farwell J.*) was to the effect that it was "necessary to bear in mind that the two propositions—(1) that dividends must not be paid out of capital, and (2) that dividends may only be paid out of profits are not identical, but diverse. The first is the requirement of the statutes, and cannot be dispensed with; the latter is in Table A or the articles of the particular company,

A company which has a balance to the

credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and if the assets subsequently increase in value the amount neither has been nor will be part of the capital. If therefore, a part of that balance is used in paying a dividend, that dividend is not paid out of capital, because the sum has never become capital, although it still remains a question whether it has been paid out of profits or not. On this point the decision whether these profits so treated could be applied to the payment of dividends depends upon whether the company "finally and irrevocably capitalised those profits." This point was dealt with by *Russel J.* in a recent case (*Stapley v. Read Brothers, Limited*, 1924, 2 Ch. D. 1) where good-will was written off out of profits and the directors wrote back to the profit and loss account so much of the depreciation as proved to be in excess of the proper requirement, which step was objected to. In the judgment his Lordship observed that "If the company had kept their accounts in a different form, no difficulty would have arisen. If they had retained good will as an asset in their balance sheet, and if, instead of writing off its value out of profits, they had carried those profits to a good-will depreciation reserve fund, they would have been at liberty at any time to distribute those profits, at all events to the extent by which the amount of such a reserve fund exceeded the amount of the actual depreciation. . . . Does it make any difference that they have kept their accounts in another form, and that instead of placing the profits to a reserve account, they have purported to apply them in writing off a corresponding amount of the value of the good-will? The answer seems to me to depend upon the further question, have the company finally and irrevocably capitalised those profits so as to disentitle themselves for ever afterwards from restoring them to reserve and from dealing with them as profits?" It was decided that they did not; and therefore these were profits which were not capitalised.

*In re Fisher v. Black and White Publishing Co.*, 1901, 2 Ch. D. 174, where the memorandum of association of the com

pany provided that the dividends were to be paid from "profits from time to time available for dividend" it was held that what was meant was that, such profits as were available after making all proper deductions for the purpose of paying dividends were divisible and that this expression "available for dividend" when added to the word "profits," meant, when read in connection with the constitution of the company concerned, those left after proper provision by way of a reserve fund, either to meet contingencies of equalising dividends, or for repairing or maintaining the works connected with the business of the company, had been made by the directors. This decision was mainly due to the fact that the memorandum of association of the company concerned particularly required these deductions to be made, and the directors had full discretion in the matter. In another case it has been held that there was no rule of law prohibiting the division of the profits of one year's trading merely because the trading of the previous year had left a debit balance in the profit and loss account (*In re Crichton's Oil Co.*, 1901, 2 Ch. D. 184).

We have already seen that if the directors so desire, they can also treat the appreciation in the value of fixed capital assets as profits. Pixely in his book entitled "Duties of Auditor." (11th edition) page 588, quotes an unreported case, viz., in *re the Midland Land and Investment Corporation*, heard before Chetty J., on 8th November, 1886, in which the learned judge laid down that "In declaring a dividend, in my opinion, in trading concerns, the Directors are entitled to put an estimate on the value of their assets from time to time, in order to ascertain whether there is, or is not, a surplus remaining after providing for liabilities (including, of course, paid-up capital), and where they made these valuations from time to time on a just and fair basis, and take all the precautions which ordinary prudent men of business engaged in a similar business would do, they are entitled to treat the surplus thus ascertained as profit."

In another case where the articles specifically provided that the directors should make due allowances for reserve fund for mainte-

nance, repairs, depreciation and renewals, it was held that, what was here meant was that such dividends on ordinary shares should be declared only after restoring the tramway which the company was running to an efficient state, and after making due provision for that purpose out of the company's assets, but that as the holders of preference shares, who were to be paid dividends according to the articles out of "the profits of the particular year only," were entitled to be paid after providing a proportionate amount sufficient for the maintenance of the tramway for that year only, and that they cannot be deprived of their dividend in order to make good sums which had not been set aside in previous years (*Dent v. London Tramways Co.*, 1881, 16 Ch. D. 344). It is also correct to charge interest on monies borrowed for the purpose of constructing work to the capital account, because there is no rule of law to compel companies to charge the same to revenue account (*Hinds v. Buenos Ayres Grand National Tramways Co.*, 1906, 2 Ch. D. 654). In case where the memorandum contains the words "holders of preference shares shall be entitled out of the net profits of each year to a preference dividend, etc.", it was held that this did not mean cumulative dividend and that it meant ordinary preference (*Staples v. Eastman Photographic Materials Co.*, 1896, 2 Ch. 303).

It may be further added that the good-will of a trading company is decided to be fixed capital, and that while ascertaining profits it is not necessary to make good any depreciation in respect thereof (*Wilmer v. McNamara and Co.*, 1895, 2 Ch. D. 245). We have seen that the articles frequently provide that the directors must lay aside a sufficient sum out of profits as reserve fund. Even where they do not so provide, it is both lawful and proper for the directors to create such a reserve if they so desire, and in that case the Court shall have no jurisdiction to interfere (*Burland v. Earle*, 1902, A C. 95).

### Declaration of Dividends

Having thus considered and decided the question as to what is exactly meant by divisible profits, we may now proceed to deal

with the question of dividends. We have already seen that the law allows considerable latitude to the directors with regard to the method of arriving at the figure of what is called divisible profits. **Dividends** may be described in brief as a division of that part of the divisible profits which are declared either by the board of directors, or by shareholders, as distributable among the members. Where there are different classes of shares, the payment of dividend is determined by the agreement contained in the articles, and failing that, in proportion to the nominal value of the shares irrespective of whether some shares are fully or partly paid (*Bridgewater Navigation Co.*, 1891, 2 Ch. 317).

The power to declare dividends depends on the articles of association of the company concerned. It is generally vested in the directors, and also in many cases they are declarable in the general meeting. According to Clause 95, Table A, the company in general meeting is empowered to declare dividends, but, it is laid down that no dividends so declared shall exceed the amount recommended by the directors. Even when this clause is not adopted by the articles, the company cannot compel the directors to declare dividends out of capital. Table 'A' virtually provides to the effect that no dividend shall be paid otherwise than out of profits. Dividend must always be **paid in cash** unless there are words in the articles providing for the payment of dividend in specie (*Wood v. Odessa Water Works Co.*, 1889, 42 Ch. D. 645). They are of course payable to those **members** who were on the register of members on the **date of the declaration** of such a dividend (*Taylor Phillips Richard's Case*, 1897, 1 Ch. D. 307). In the payment of dividends, profits which were transferred to the reserve fund may also be utilised (*Re. Hoare and Co. Ltd.*, 1904, 2 Ch. D. 208). It is also frequently laid down in the articles as it is laid down in Table A, Clause 102, that no dividend shall bear interest against the company.

Besides the final dividends, directors, when so empowered by the articles, can declare what is called an interim dividend. If after

declaring such an **interim dividend**, the directors find that in doing so they were mistaken, they may cancel the declaration at any time before the payment (*Lagunas Nitrate Co. v. Schroeder & Co.*, 1901, 85 L.T. 22). But it is no doubt the duty of the directors to satisfy themselves before declaring such an interim dividend, that there were profits to divide (*Towers v. African Tug Co.* 1904, 1 Ch. D. 558). According to *Alverston C. J.*, in *Lucas v. Fitzgerald*, 20 T. L. R. 16, "the declaration of interim dividend depends much more upon estimates and agreements than the declaration of a final dividend, which is made upon information contained in the formal balance sheet."

If dividends are paid out of capital, the directors who are responsible for such payment will be jointly and severally liable to replace the amount (*London and General Bank*, 1895, 2 Ch. D. 673; *Oxford Benefit Building Society*, 1889, 35 Ch. D. 502). Directors so paying the amount will, however, have the **right of contribution** from their co-directors who happen to be equally liable. The shareholder or member who receives payment of dividend paid out of capital knowing it is so paid, will be liable to be called upon to repay the same (*Moxham and others v. Grant*, 1900, 1 Q.B. 88).

The dividends once declared become a debt due by the company. **Limitation** beings to run immediately after the declaration of dividend (*Severn and Wye Railway Co.*, 1896, 1 Ch. D. 559). This of course will not apply to the cases of interim dividends which as we have seen above may be rescinded or deferred.

If the dividends were paid by the directors *bona fide* relying upon the **valuation of experts** which turn out to be erroneous, they will not be responsible (*In re Mercantile Trading Co., Stringer's Case*, 1869, 4 Ch. 475). It, however, the articles clearly state that the dividends are to be paid out of realised profits only, the directors may be liable if they pay dividends out of estimated profits (*In re Oxford Benefit Building Society*, 1889, 35 Ch. D. 502). If, however, the directors rely upon the judgment, informa-



tion or advice of the chairman, general manager, or other responsible and trusted officer of the company while arriving at their decision as to the declaration of dividends, they will be protected, unless there was some ground for suspicion. In *Kingston Cotton Mill Co.*, No. 2, 1896, 2 Ch. 331, where the stock in trade was grossly overstated in the accounts from year to year, which stock was taken on the basis of a certificate signed by the managing director, the other directors, who, relying on the balance sheet on the basis of this stock and the signature of the company's auditors, sanctioned dividends, were exonerated from liability. So also were the auditors, because it was held here that it was no part of the duty of the auditors to take stock, and thus they were justified in placing implicit reliance on the certificate of the manager. The same principle was acknowledged in *Dovey v. Cory*, 1900 A C 477. It has also been held that in case there is a *bona fide* increase in the value of the fixed assets, the said increase can be utilised for the purpose of writing off any debit balance that may be standing on the company's profit and loss account, with a view to being able to pay dividends out of current profits (*Ammonia Soda Co v. Chamberlain*, 1918, 87 L.J. 193).

With reference to the period of **limitation** applying to dividend declared, it has been decided in a fully bench case that a suit for dividend declared is a suit for debt, and not compensation on a breach of contract, and Art 120 of the Indian Limitation Act, 1908, applies, under this article the period laid down is six years from the date the right to sue accrues (*A. Venkata Gurunatha R. Seshayya v. Sri Tripurasundari Cotton Press*, 49 Mad. 468). In **English Law**, however, this period is twenty years from the date of declaration (*Artisans Land and Mortgage Corporation*, 1904, 1 Ch. D. 796).

### **Reserve Fund**

Frequently, joint stock companies lay aside a certain sum out of profits under the heading of "reserve fund." This reserve may be made with a view to provide a fund out of which any unexpected

emergency may be met with and is known as "**general reserve**". Besides thus laying aside amounts from time to time, a certain proportion of profit is also set aside to meet some estimated loss of more or less recurring type, such as, bad debts, deprciation, etc. This reserve is known among accountants as "**specific reserve.**" There is, of course, no definite ruling of law, apart from that which the company itself may provid for in its articles, compelling the directors to provide for contingencies. This reserve fund is sometimes invested in outside securities, and sometimes allowed to remain in the business as so much additional working capital. There is no objection to either of these two courses being followed, *i.e.*, reserve fund may be invested in the business of the company itself and this entails no obligation to keep it separate from other assets (*In re Hoare and Co , Ltd.*, 1904, 2 Ch. D. 208). Frequently, the articles of association contain a clause empowering directors to set aside out of the profits of the company, such sums as they think proper as a reserve, or reserve fund, which shall, at the discretion of the directors, be applicable to meet contingencies, or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied. Powers are also given under which the directors may, at their discretion, employ the said reserve fund in the business of the company, or invest it in such investments (other than shares of the company itself) as the directors may from time to time think fit (Cl. 99, Table A). When such powers are given to the directors, they have complete freedom in determining the amount which they think necessary and proper to lay aside before determining the balance of divisible profits; and this course may be pursued in spite of the fact that it may prevent the payment of dividends altogether (*Fisher v. Black and White Publishing Co.*, 1901, 1 Ch. 174).

We have here talked about the reserve fund being created from the profit and loss account. Frequently, **unexpected profits**, such as premium on shares sold by the company, etc., are credited to the reserve fund account. In this connection it may be men-

tioned that there is no obligation in law to credit this type of profits to the reserve fund account. It may be distributed as profits, and dealt with in any such lawful manner as the profits of the company may be dealt with. It may be further mentioned that a reserve fund which has been created from profits of past years, remains nothing more than a balance of accumulated profits, and is thus divisible among members in case of liquidation on the same lines as the profits, and that the mode of application will largely depend upon the privileges enjoyed by each class of shareholders according to the company's constitution.

The next point is whether the profits accumulated by way of reserve fund could be paid out in the form of fully paid shares. This operation is known as "**Capitalisation of profits.**" When the **articles** authorise the directors so to apply profits, *i.e.* to issue fully paid shares in satisfaction of dividends or bonus, that can be done, failing this, any shareholder can claim to be paid his share of dividends or bonus in cash (*Wood v. Odessa Water Works Co*, 1889, 42 Ch. D. 637 per *Stirling J.*, p. 645) In *Commissioners of Inland Revenue v. Blott*, 1920, 1 K. B. 114, the company declared a bonus out of its undivided profits, having power in the articles to do so, to be paid in fully paid shares. It was held that this was an addition to capital of the shareholder and not his income, and therefore no super-tax was payable. This was upheld in the House of Lords (*Commissioners of Inland Revenue v. Blott and Greenwood*, 1921, 2 A. C. 171).

### **Secret Reserve**

Besides creating a reserve fund in the usual manner, *viz.*, a transfer from the Profit and Loss account to a special heading of reserve fund account, which is in the usual course exhibited on the balance sheet under the heading of "reserve fund," it is the practice with some companies to create what is known as a "secret reserve". The **object** of this secret reserve is to provide a medium out of which losses can be secretly met, thus preventing undue loss of credit through their publication. This course, it is urged, is in the

interest of companies carrying on businesses of a nature which to a large extent depend on their credit, such as banking institutions. This is done through the application of any one of the following methods :

- (1) over-depreciating fixed assets,
- (2) over-creation of reserve for bad and doubtful debts,
- (3) debiting capital expenditure to revenue,
- (4) under-valuing stock in hand,
- (5) writing off good-will.

There is no doubt a considerable difference of opinion among accountants and businessmen as to the advisability of this course being followed. The strongest objection to it being that the practice might lend itself to the company's fund being misused for the personal advantage of the directors or their friends. The position of law in this connection is uncertain as the only case decided on the subject is *Newton v. Birmingham Small Arms Co., Ltd* , 1906, 2 Ch. 378, which was largely influenced by Sec. 23 of the English Companies Act of 1900, which has been considerably altered by the English Act of 1908. It is the latter Act which our Act of 1913 largely follows. This case, however, brings out the point, *viz.*, that the auditor is not bound to disclose the fact that the financial position of the company is better than what is actually shown on the balance sheet though, of course, the company according to this decision, cannot by resolution or otherwise, deprive the auditor of his right to state in his report such matters as the law obliges him to do in connection with the accounts of the company. It was further remarked that the principle to be followed by the auditors was that, where such a secret reserve was created for a legitimate purpose, and that there was no room for suspicion, they may use their discretion and decide not to disclose their secret reserve in their report. In this case the actual facts were that the company passed resolutions altering their articles, by which alterations they empowered the directors to set aside

sums out of profits, without disclosing them on the balance sheet under the heading of "reserve". This clause also empowered the directors to invest the said reserve in outside securities, and further it was laid down that the auditors were also not to disclose any information with regard to this reserve to the shareholders. The Court of course came to the conclusion that, the first part of the resolution empowering non-disclosure of reserve to the shareholders was not quite objectionable, but the second part which compelled the auditors to act in a manner inconsistent with the obligations imposed on them by the Act of 1900, were *ultra vires*. In his judgment, *Buckley J.* made the following remarks:—

"The special resolutions in the present case provide that the balance sheet shall not disclose the internal reserve fund. It must therefore omit on the assets side of the balance sheet the assets which make up the amount standing to the credit of that fund, and the *contra item*—namely, the credit balance of the fund—on the liability side. The result will be to show the financial position of the company to be not so good as in fact it is. If the balance sheet be so worded as to show that there is an undisclosed asset, whose existence makes the financial position better than that shewn, such a balance sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probable real value. The purpose of the balance sheet is primarily to shew that the financial position of the company is at least as good as there stated, not to shew that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance sheet is not, I think, necessarily fatal to these special resolutions. The Act, however, provides that the auditors shall report to the shareholders on the accounts examined by them. These auditors will examine, amongst others, the accounts of the internal reserve fund. A principal question in this case, I think, is whether it is a compliance with these words of the Act that the auditors shall report that they have examined the accounts as to the internal reserve fund, that they are satisfied with them, and that

the funds have been employed in manner authorised by the company's regulations, or whether there will be default in complying with the Act if they do not go on to say how the fund has been employed. In my judgment such a report would be a sufficient report within the Act if the auditor is *bona fide* satisfied that in making this report, and nothing further, he is truly reporting as to 'the true and correct view of the state of the company's affairs.' But the special resolutions do not stop there. They provide that it shall be the duty of the auditor not to disclose any information with regard to this fund to the shareholders or otherwise. It is, I think, inconsistent with the Act of Parliament that the auditor shall be bound, even when he thinks that the true state of the company's affairs is affected by facts relating to the internal reserve fund, to withhold information with regard to the same from the shareholders. If, for instance, the directors had invested the internal reserve fund upon investments which might involve the company, under certain circumstances, in enormous loss, the Act, I think, requires that the auditor shall be at liberty and be bound to report that fact. In reporting upon the accounts submitted to them the auditors do not, of course, report as to the details of accounts to which they find no cause to take exception. Their duty is to call the attention to that which is wrong, not to condescend upon all the details of that which is right. It is, I think, competent to the statutory majority of the shareholders to say that as to particular items of their business it is to the interest of the corporation that there shall be secrecy, and that the auditors, who must for the purposes of their audit know all such details, shall not, unless their duty under the statute requires it, disclose such details to the members. There is no suggestion in this case that these clauses are intended to be used for any other than a legitimate purpose. Those who are engaged in commerce are familiar with the fact that undue publicity as regards the details of their trade, or as to their financial arrangements, may often be very injurious to traders, having regard to the rivalry of competitors in trade, to complications sometimes arising from strained relations between capital and labour, and the like. These are legitimate

reasons for ensuring secrecy to a proper extent. It is not, I think, necessary, nor, having regard to the great utility of these Acts, is it desirable, to expose persons who trade under these Acts to the necessities of a publicity from which their competitors are free, unless such publicity is required to ensure commercial integrity. I am not disposed to look too closely for reasons why I should find clauses such as these to be inconsistent with the Act if I see that the true purpose of the Act is satisfied. I think, however, these special resolutions go too far. Any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which under the Act they are to make as to the true and correct state of the company's affairs, are, I think, inconsistent with the Act."

### **Dividend Equalization Reserve**

There is one form of reserve fund which remains to be mentioned and that is a reserve frequently created by joint stock companies and called "dividend equalization reserve". The object here is that where the profits of a company vary considerably from year to year, a fund is created to enable the company to pay uniform dividends. Thus during the prosperous years such a reserve may be created and utilised for payment of dividends during lean years, thereby maintaining uniform level of dividends from year to year. This of course not only has the merit of giving the shareholder a uniform dividend, but also maintaining the capital value of his investment on the market, which would otherwise fluctuate with the larger or smaller dividend paid from time to time. The general opinion from a business standpoint happens to be that in this case the reserve should be invested in outside securities of a reliable nature, because the reserve has to be drawn upon during the period of depression, while if the amount were to be invested in the business itself, the company would find itself more embarrassed than ever.

### **Interest out of Capital**

We have already noted the **well-known rule** of Company Law, *viz*, **that dividends cannot be paid out of capital but should only be paid out of profits**. To that well-known rule there is an **exception** provided for by Sec. 107, where a company whose shares are issued for the purpose of raising money to defray the expenses of the construction of any works of buildings, or for the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up, and may charge it to capital, as part of the cost of construction of the work, or buiding, or for the provision of plant. A power has to be taken in **articles** for this purpose, **or** else, a **special resolution** will be necessary to give effect to this payment. In either case, **previous sanction of the Central Government** has to be obtained. The Central Government before sanctioning such payment may, at the expense of the company, appoint a person to enquire and report as to the circumstances of the case, and may, before making the payment, require the company to give security for the payment of the costs of the enquiry. The payment shall be made only for the period as may be determined by the Central Government, and such period shall in no case extend beyond the close of the half year next after the half year during which the work or buildings have been actually completed or the plan provided. The **rate of interest** shall in no case exceed 4 per cent. per annum. The Central Government may, by notification in the Official Gazette, prescribe a lower rate. Further it is provided that the **accounts** of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate.

### **Balance Sheet**

We have already seen in the beginning of this chapter that every joint stock company has to prepare a balance sheet and a profit and loss account; and that every company other than a



private company shall send a copy of such balance sheet to the address of every registered shareholder at least fourteen days before the meeting at which it has to be laid before the members. In **English law** seven days are sufficient and it is not compulsory to send the profit and loss account to the shareholders. The auditors' report may be either attached to the balance sheet, or may be made out separately. In case it is made out separately, reference to this report must be made on the balance sheet. It is, however, considered more desirable that the report should be attached to the balance sheet, and should be put down at the foot of it, provided it is not likely to be a lengthy one. This course is generally followed. This report has to be read before the shareholders in the general meeting, irrespective of whether the same is published with the balance sheet. For this purpose the **form** marked "**F**" in the third Schedule of the Act has to be followed. The figures as shown in the balance sheet do not as a rule indicate the exact position of the company. The latter is more or less an approximation. This is particularly so in case of fixed assets. Their values as appearing in the balance sheet may indicate book balances at cost, *minus* depreciation, whereas the market value may have varied considerably since they were purchased. On the other hand the fixed assets may have been revalued for the purpose of the balance sheet.

All that is wanted in law is that the position of the company as shown by the balance sheet is not exaggerated, *i.e.*, shown actually better than what it happens to be (*Newton v. Birmingham Small Arms Co., Ltd.*, 1906, 2 Ch. D. 378 at p. 387). Thus the directors can even value the stock at a much lower value than what it actually represents, but they should not show it at a higher figure. If, however, this financial position were made to appear bad, with a view to buying in shares cheap from shareholders, that would be highly objectionable. If any **commission** is paid on the issue of the shares, this should also be shown on the balance sheet until it is written off. When the assets are shown at a valuation, the mode of valuation should also be indicated.

The Form F as substituted by the Amendment Act of 1943, given at the end of the Companies Act, is to be followed in India as far as possible by all companies registered under the Indian Companies Act, 1913. Instead of giving a list of new alterations, the old Form F was replaced by an entirely redrafted Form "so that it shall itself present the complete form." The alterations made were influenced by a desire, according to the select committee, "to improve the Form from an accountancy point of view." A private company of course is not required to file a copy of its balance sheet with the registrar (S. 134 (3)). Every member of a company (including a private company) is entitled to be furnished with the copies of balance sheets, the *profit and loss account* or the *income and expenditure account* and the auditor's report on payment of a charge not exceeding annas six for every hundred words (S. 135). The preference shareholders and the debenture holders, except in case of a private company or a company registered before 1st April, 1914, have also the right to receive and inspect the balance sheet of the company and the report of the auditors on the same footing as ordinary shareholders. *In the case of a public company the trustees for the debenture holders shall have the same right* (S. 146).

### **Foreign Companies Balance Sheets and Documents**

In the case of foreign companies *i.e.*, companies established outside British India, Sec. 277 lays down that every such company, shall in every year, file\* with the registrar of the province in which the company has its principal place of business, a balance sheet in the form required by the law for the time being in force in the country where it was incorporated if the said law requires the company to file an annual balance sheet with the public authority, *and if the balance sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements as shall furnish such information.* In case where no such provision is made by the law of the country in which the company is incorporated, the com-

pany shall present such a statement in the form of a balance sheet as such company would, if it were formed and registered under the Indian Act, be required to file. This section affects companies incorporated outside British India which have a place of business in British India, but does not affect those who do business only through agents or correspondence from abroad. It has been held that carrying on business through an agent or agents is not establishing business within the section (*Baillie v. Goodwyn & Co.*, 1886, 33 Ch. D. 604 ; *Grant v. Anderson & Co.*, 1892, 1 Q.B.D. 108 ; *Huron v. Erie Loan Co.*, 1911, S.C. 612). In case of a foreign company which has places of business in more than one centre within British India they have to file documents as required in this section with the registrar of each province in which the business happens to be situate.

A foreign company which is to be a private company is not required to file a copy of the balance sheet under this section. It has been held that persons who are authorised under this section to accept process or notices on the company, cannot remove their names from the file or disclaim their position as representatives of the companies concerned with a view to affecting the position of creditors (*Sedgwick, Collins & Co., v. Russia Insurance Co.*, 1926, 1 K.B. 1 ; *Sabatier v. Trading Co.*, 1927, 1 Ch. 495 W.N. 21).

### Minute Book

The Act requires every company to cause minute of all proceedings of the general meeting and also those of its directors, to be entered in books kept for the purpose. These minutes, when signed by the chairman of the same, or the subsequent meeting, shall be evidence of the proceedings, until the contrary is proved, of the meeting of which minutes have been so taken ; and such meeting shall be deemed to have been duly called and all appointments of directors or liquidators shall be deemed to be valid (S. 83). The minutes of the meeting cannot be **altered** subsequently, except through the usual method of bringing forth the proposition at a properly constituted meeting and passing it. If the secretary were

to alter such a minute, and strike out some part of it, either on his own responsibility, or under the order of the superior officers, that proceeding would be irregular (*In re Cowley & Co.*, 42 Ch. D. 209). If some part of the proceedings is omitted from the minutes the same must be proved by evidence. otherwise, the presumption will be that such a proceeding did not take place.

It is the usual practice of companies to keep more than one minute book, *viz.*, one for the meeting of shareholders, the other for the board meetings, and in case the board is divided into committees, separate minute books for each of the committees should also be maintained. This is, however, a question of administrative convenience, and there is nothing in law to prevent companies from keeping one common minute book for all proceedings. The latter course, however, may give rise to difficulties in case of the claim for the inspection of minute books by members. The general meetings' minute books, if kept separate, can be conveniently given for such inspection of members, whereas, the board meetings' minute books are not generally available for such inspection, as they contain private and confidential matters. This board meeting book, however, must be open to the inspection of the directors, the secretary and the auditors. According to Table "A" Cl. 75, the directors' minute book must contain minutes of all appointments of officers made by the directors, together with names of the directors present at each meeting of the directors and of any committee of directors, and all resolutions and proceedings at all meetings of the company, the directors and of the committees of directors. It further lays down that every director present shall sign his name in a book kept for that purpose. This provision is generally found incorporated in the articles of association of all well-regulated companies.

### **Register or mortgages and charges**

We have already dealt with the details of this book in the Chapter on "Debentures and Borrowing." To put it briefly,

the Act requires the register of mortgage and charges to be specially maintained by every joint stock company, in which are to be entered a short description of the property charged or mortgaged, together with the amount of the mortgage and the names of the mortgagees.

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## CHAPTER XIV.

### AUDIT AND AUDITORS

#### Qualifications and Appointment

Company Law requires a company to appoint at each annual general meeting, an auditor, to hold office until the next annual general meeting, failing which, the Central Government (the Board of Trade under the English Act) may, on the application of any member of the company, appoint an auditor of the company from the current year and fix the remuneration for his services to be paid to him by the company. In making such an appointment care should be taken to see that no person holding the office of a director or officer of the company, or that of partner of such a director or officer, and in case of companies other than a private company, no person in the employ of such a director or officer, is appointed. *Neither can any person indebted to the company be appointed auditor; and if any person after being appointed auditor, becomes indebted to the company, his appointment shall be terminated* (S 144 (5) (iv)). It is further provided by our Indian Companies Act that in the case of a company other than a private company, the auditor shall be a person holding a **certificate** from the Central Government entitling him to act as an auditor of companies, or who is a member of any institution or association specified in the notification in the Official Gazette by the Central Government. Our Act here lays down a principle which places it a step forward in comparison with the English Companies Act where no specific qualification for auditors of public companies is insisted upon.

It is further laid down that, the **retiring auditor** can only be removed at a subsequent meeting if the person who proposes to appoint some other person to the office of auditors gives a **notice** to the company to that effect of at least not less than

fourteen days before the date of the annual general meeting. A copy of such a notice should be sent by the company to the retiring auditor, and it must also inform its members as to this notice either by advertisement, or by any other method allowed by the Articles, not less than seven days before the annual general meeting.

The **first auditors** may be appointed by the directors before the statutory meeting and they shall hold office until the first annual general meeting, unless removed by the members of the company in general meeting, in which case such members of that meeting may appoint new auditors. If any **casual vacancy** in the office of auditors occurs, it may be filled by the directors, and until such vacancy is filled, the surviving auditor, if any, may continue to act. The **remuneration** of the auditor is fixed by the company in general meeting, except in the case of those appointed by the directors before the statutory meeting, or with a view to fill any casual vacancies, in which case the said directors may fix their remuneration (S. 144).

The **articles** of association of a company generally provide rules as to the appointment of auditors. It will be noticed that auditors have to be appointed in the case of both private and public companies, with this difference, that in the case of **private companies**, the auditor need not be a person possessing the requisite qualification. We have noticed above that Sec. 144 (6) insists on the notice being given to the retiring auditor or auditors who are to be replaced. This requirement was first introduced in the English Act of 1907, to prevent the directors from getting an inconveniently strict auditor replaced through the appointment of a nominee or friend. This provision as to notice at least affords the auditor an opportunity to place his case before the shareholders if he desires to do so. Of course, the Act does not give the auditor an express right to attend the meeting of the company, but the permission to do so is seldom refused when asked. This difficulty will not arise when the auditor is

also a shareholder, as he can in such case, be present at the meeting in his capacity of a shareholder; while, in extreme cases he may have his case presented through members sympathetic towards him.

### Number of Auditors

The number of auditors to be appointed depends on the provisions in the **articles** of the company concerned. Almost every company of importance employs at least two auditors. In the case of companies having foreign branches, it is the practice to appoint local auditors for such foreign branches. Frequently, debenture holders or some special class of shareholders are given the privilege of appointing separate auditors, *i.e.* over and above those appointed by the company in general meeting on behalf of the general body of shareholders.

When the articles of association of a company provide for the appointment of two auditors it will not be correct to appoint a firm of accountants made up of two or more partners, but two distinct firms or two members of two distinct firms will have to be appointed. Here the responsibilities of the joint auditors will be both joint and several, unless in the terms of the contract it is made clear that one auditor has to do a particular part of the audit and the other is to look after some other sphere. Frequently, auditors arrange among themselves to divide the work, one agreeing to check books of original record, and the other, finishing up the said audit by checking the work of final record and the balance sheet. This will not relieve either of them of responsibility for negligence in connection with the work done by the other, as the **responsibility is always presumed to be joint**, and the conditions of the appointment in themselves clearly imply that two men are appointed, instead of one, in order to ensure a double check. It is suggested in some quarters, particularly by Mr. Spicer, Chartered Accountant, in his book on "Practical Auditing" that in case of division of work by auditors by



mutual agreement "it will be desirable for the auditor to avoid responsibility for the work he has not performed by specific statement in the report of the extent of the audit carried out by each." Whether this statement will actually exonerate an auditor who has been appointed to do the work jointly with another auditor and is paid his full remuneration on the supposition that he will take up the joint and several responsibilities for the complete audit, is a doubtful proposition.

### **Their Status**

The exact legal status of the auditors is not finally established, either by decisions or by the Act, as far as their relation to the shareholders is concerned. They are, no doubt, appointed by the shareholders as their representatives, to check the accounts on their behalf and to report to them. They are thus in some sense the **agents of the shareholders to a limited extent**. That was at least the view taken in *Nicol's Case*, 1858, 3 De G. and J. 386; but in a subsequent case (*Spackman v. Evans*, 1866, L. R. 3 H. L. 236), it was further laid down that they were not agents in the sense that the knowledge of auditors is to be taken for granted as the knowledge of shareholders, as would be the case according to the Law of Agency where the notice to an agent is considered to be equivalent to a notice to the principal. Mr. Francis W. Pixley, one of the past presidents of the Institute of Chartered Accountants of England and Wales, in his book on "Duties of Auditors" states as follows :—

"The shareholders of a company may, therefore, be said to have two representatives of their interests, the one administrative, as represented by the Directors, the other critical, in the person of the auditor. The latter is practically a check on the former, and frequently prevents the Directors from acting impulsively or recklessly, they knowing that their transactions will ultimately be reviewed calmly and impartially by the Auditor, who will communicate the result of his investigation and criticism to the shareholders to be acted upon by them as they may think proper at their meeting."

The auditor is also an **officer of the company** and would be **liable**, like other officers, **for misfeasance** in accordance with

Secs. 235, 236 and 237 of the Act. The above three sections provide that where in course of winding up it appears that any person who has taken part in the formation or promotion of the company, or in the past or present, as a director, manager or a liquidator or any officer of the company, and has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory, *made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer*, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or part thereof respectively, with interest at the rate thought just by the Court, or to contribute such sum to the assets of the company by way of compensation as the Court thinks just. It may, however, be noted that accountants who are simply engaged by the directors to do some accountancy work do not come under the designation of auditors, and therefore will not come under Sec. 236. It is further provided that any officer, manager or director, meaning and including auditor, who destroys, mutilates, alters, falsifies or secretes any books, papers or securities, or makes or is party to the making of, any false or fraudulent entries in any register, book of accounts or document, belonging to the company with intent to defraud, shall be liable to punishment (S. 236); and if it appears to the Court in the course of winding up that any of the said officers have been guilty of any offence in relation to the company for which they are criminally liable, the Court may, of its own motion or on that of any person interested in the winding up, direct the official liquidator to prosecute the said officers (S. 237).

It will be thus seen that as far as our Companies Act is concerned, auditors are declared to be officers by the section above quoted, and besides that, in Sec. 144 the words "every

company shall at each annual general meeting appoint an auditor or auditors to *hold office* until the next annual general meeting," are used. This is what, it is thought, brings them under the designation of officers as far as the Indian Act is concerned, for the purpose of and within the meaning of the Act.

### Their Rights

The Indian Act lays down that every auditor of a company shall have a **right of access** at all times to the books, accounts and vouchers of the company. He shall be entitled to require from the directors and officers of the company such **information and explanation** as may be necessary for the performance of the duties of the auditors (S. 145).

As will be noticed, these powers are very wide, because they not only empower the auditor to inspect books of accounts and vouchers of the company, but such an inspection can be claimed by him at any time, and that too without being required to give a prior notice. **Books of account** mean and include all financial books, *plus* statutory books, including the minute book or books of the company. On this point, *viz.*, the power of the auditor to inspect the books of account at any time there is one relevant case, *viz.*, *Cuff v. London and County Land and Building Co. Ltd.*, 1912, 1 Ch. D. 440. Here the secretary of the company having been found guilty of defalcations by which loss was occasioned to the company, the directors accused the auditors of negligence and refused to them inspection of the books of the company. The auditors brought an action with a view to enforce their right of inspection, which, according to them, being a statutory right could not be denied. *Eve J.* granted an order in favour of the auditors, but in the Court of Appeal this order was upset on the ground that this right of access to the books, though statutory, could only be enforced by a mandatory order of the Court, provided the Court in the exercise of its judicial discretion thought fit to grant the same under the circumstances of each particular case. In this

case it was wrong to have given the order without taking steps to ascertain whether the company was desirous that the said auditors should continue to act as auditors in spite of this charge of negligence against them. It is thus clear, that the statutory right given by the Act can be enforced only through the intervention of the Court, provided that the Court in its judicial discretion grants the same after taking into consideration the circumstances of the case before it. With regard to the right to ask for explanations all that need be said is that in case of refusal to give any explanation asked for by auditors within their sphere of audit, the course left open to them is to insert that fact in their report to the shareholders.

### **Their Duties**

The Act further lays down in connection with the auditors, to the effect that they shall make the report to the members of the company on the accounts examined, and on the balance sheet *and profit loss account* laid before the company in general meeting during their tenure of office. The **report** has to state, (1) whether or not they have obtained all the information and explanations they have required; (2) *whether or not in their opinion the balance sheet and the profit and loss account referred to in the report are drawn up in conformity with the law*; (3) whether or not such balance sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and explanations given to them and as shown by the books of the company; (4) *whether in their opinion books of accounts have been kept by the company as required by Sec. 130*. It is further added that *where any of the matters referred to in (1), (2), (3) and (4) is answered in the negative or with a qualification the report shall state the reason for such answer* (S. 145 (2) 2A). In case of a banking company where the company has branch banks beyond the limits of India, it is sufficient if the auditor is allowed access to such copies of any extracts from the books and accounts of any such branch as have

been transmitted to the head office of the company in British India ( S. 145 (3) ).

Now the Indian Companies (Amendment) Act of 1936 lays down that *auditors shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined and reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts* (S. 145 (4)). *Where any auditor's report is made which does not comply with the requirements of the section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees* (S. 145 (5)). It has been held that an auditor's certificate, if founded on a wrong principle of law, will not be binding (*Johnston v. Chestergate Hat Manufacturing Co.*, 1915, 2 Ch. 338; *Thomas v. Hamlyn & Co.*, 1917, 1 K.B. 527).

This right of auditors, or rather their duty, is one which cannot be altered, nor can any limitations be placed on them through cleverly devised clauses in the articles of association compelling auditors not to disclose certain facts in their reports, as that would be inconsistent with the obligations imposed on the auditors by the Act (*Newton v. Birmingham Small Arms Co.*, 1906, 2 Ch. D. 378). The auditor has to report to the shareholders whether in his opinion the balance sheet is correct according to the best of his information and explanations given to him. **He does not certify the balance sheet**, as is frequently erroneously asserted. This report has to be made by him after having carefully examined the books of account of the company, because he has to state in his report that the balance sheet which he has examined, and on which he reports, is correct as shown by the books of the company. It thus follows that if the books of the company are not accurately kept, the auditor should mention the fact in the report, but in case of inaccuracies of a character which the auditor cannot, with the use of ordinary diligence discover, (say omission of certain

items of business from the books, which could not have been traced by the auditor through the usual means of examination by him) he will not be held responsible. A learned judge (*Lopes L. J.*) in the case which we shall cite hereafter, aptly puts it that **"the auditor is a watch-dog and not a bloodhound,"** by which it is meant that the first care and duty of the auditor is to see that everything is in order and above par, as far as the accounts and books he is called upon to examine are concerned. He has to approach the work with the state of mind, not of a blood-hound or a detective full of suspicion that something wrong has been done, or might have been done. Of course if on examination of the account books he comes across some items which excite his suspicion, he must dive deep into the facts and figures until he is satisfied that there is nothing wrong. Otherwise, he will be quite justified in believing a tried and old servant of the company to be honest, and examining the accounts in that belief. In arriving at his conclusion, he must examine accounts, but how much of the accounts or how little of the accounts he should examine in order to be satisfied, is left entirely to his discretion. **He does not, so to say, guarantee or underwrite the strict accuracy of the accounts against errors and frauds.** He must, moreover, remember that his duty begins and ends with the examination of accounts and reporting on them to his patrons, the shareholders. He is not there to advise or direct the board of directors as to the method of conducting the business, nor to admonish them on the propriety or impropriety of borrowing or lending money. He is neither a financial expert nor is he there in the capacity of a valuer. In this connection the following passages in the judgment of *Lindley L.J. in re London and General Bank No. 2, 1895, 2 Ch.D. 673* are important. According to his Lordship:—

"It is no part of the auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the

shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question. How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance sheet shewing that position according to the books and to certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of *Stirling J. in Leeds Estate Building and Investment Co. v. Shepherd*, 36 Ch. D. 802. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must employ reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little enquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."

Here it was also held that "an auditor who presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realising them; but in his report to the shareholders merely stated that the values of the assets was dependent on realisation, and in the result the shareholders were deceived as to the condition of the company, and a dividend was declared," was

guilty of **misfeasance** and was bound to make good the amount of dividend paid.

*Lopes J.* has also exhaustively defined the duties of an auditor which may also be noted (*In re Kingston Cotton Mill Co., (No. 2)*, 1896, 2 Ch. D. 279). Here, after referring to the judgment *in re London and General Bank Ltd.*, cited above, to which judgment his Lordship was a party, the duties of the auditor are dealt with by the learned judge in the following terms:—

"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be adetective, or as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watch-dog but not a blood-hound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful."

It is of course necessary that the auditors should make themselves quite **familiar with the contents of the articles and the memorandum** of the company whose accounts they are examining. Failure to observe this precaution may make the auditor liable to damages in case the company suffers loss by the balance sheet failing to show the true position of the company's affairs (*Republic of Bolivia Syndicate*, 1914, 1 Ch. D. 139). In the above case it was held also that in case the balance sheet did not show the true financial position of the company and damage was caused, the onus of proving that the damage is not the result of a breach of duty on their part is thrown on the auditors, otherwise they are *prima facie* responsible for *ultra vires* payments made on the face of the balance sheet. With regard to the figure of **sundry debtors of the company**, the auditor no doubt has to take guidance as to its accuracy from the books of accounts. If, from the books, he finds



that certain debts which are time-barred according to the accounts are allowed to stand, and are accounted for in the balance sheet, it would no doubt be his duty to object if they are not written off, and report the fact to the shareholders. But if there is nothing to show that the said debts are bad or doubtful, he may, on a certificate from the responsible manager, pass the items.

With regard to the **value of assets**, particularly fixed assets shown on the balance sheet, we have seen that the mode of valuation ought to be clearly stated on the balance sheet. If the auditor finds that the valuation is not accurate, all he need do is to get a certificate from an expert before passing these figures. He should particularly take this precaution when he finds that the value of assets has been enhanced since the last balance sheet instead of being depreciated. Of course it has been held (*Lee v. Neuchatel Asphalte Co., Ltd.*, 1889, 45 Ch. D. 1) that where the company's articles of association provide for a distribution of profits without depreciation on fixed assets, the directors can do so, and the Court will not interfere to prevent such a payment of dividends without deduction of depreciation. Again, while reporting on **accounts** it is not sufficient to state that the balance sheet *does not* exhibit a true state of accounts, because the auditors are bound to call attention to what is wrong (*Newton Birmingham Small Arms Co., Ltd.*, 1906, 2 Ch. D. 378 per Buckley J., p. 387).

For **breach of duty** the auditor may be sued by the company in an action for damages (*Leeds Estate Bldg. & Investment Co. v. Shepherd*, 36 Ch. D. 787); or the liquidator in a liquidation may proceed against him for misfeasance (*In re London & General Bank*, 1895, 2 Ch. D. 673 C.A.).

It is further laid down by our Indian Companies Act that in the case of a **banking company**, if the company has **branches beyond** the limits of **India**, it shall be sufficient if the auditor is allowed access to such copies of extracts from the books of accounts of any such branch as have been transmitted to the

head office of the company in British India (S. 145 (3)). The sub-section here allows access, as it will be noticed, to the statements above mentioned only in case of banks, and there is no reason why in case of other large companies the same privilege should not be extended, if the auditor is expected to make his audit as complete as possible.

We have already seen that the auditors have to make a **report** to the members of the company on the accounts examined by them. This report is required to be **attached to the balance sheet**, and it is further required that a reference to the report should be made at the foot of such a balance sheet and that such a report shall be **read before the company in general meeting** and shall be **open for inspection** by any member. Any member of the company is entitled to be furnished with a copy of the auditor's report, as well as the balance sheet and a profit and loss account or income and expenditure account at a charge not exceeding six annas for every one hundred words or fractional part thereof (S. 135). This right is given in case of public companies to members including the preference shareholders and debenture holders and trustees on behalf of debenture holders on the same footing as the holders of ordinary shares of the company (S. 146). The report of the directors submitted to the statutory meeting as to cash received and cash payments has also to be certified by the auditors of the company, if any, appointed at the time (S. 77 (4)).

With regard to the report of the auditors on the balance sheet and accounts, the council of the Institute of Chartered Accountants in England and Wales obtained a joint opinion of eminent counsel on the provisions of the English Companies Act of 1907, which provisions were ultimately incorporated in the present English Companies (Consolidation) Act of 1908. This opinion may be quoted here for the guidance of those interested in this branch of work:—

(1) In our opinion the Auditor's Report to be made pursuant to paragraph (2) of Sec. 19 of the Companies Act, 1907, should, in cases where the auditors have no special comments to make, run as follows:—

Report of the Auditors to the shareholders of, ..... Limited.

We have audited the balance sheet of the..... Limited, dated the..... day of..... and (here identify it as "above set forth" or "within contained" or "a copy of which is annexed hereto and initialled by us" or "a copy of which has been initialled by us.")

We have obtained all the information and explanations we have required.

In our opinion such balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs according to the best of our information and the explanations given us, and as shown by the books of the Company.

We consider that the Report should identify very clearly the particular balance sheet to which it refers, so that there may be no room for after-dispute or confusion and no danger that by mistake or otherwise the balance sheet submitted to the shareholders, though bearing the proper date, should not be the one actually referred to in the Report.

Perhaps the surest mode of identification is to write the Report at the foot or endorse it on the balance sheet to be submitted, for by these means the two documents are made inseparable; or in other words, the Report runs with the balance sheet. But, as it appears above, there are alternatives open. In any case the Auditors should keep a copy of the balance sheet they audit, and place a memorandum of identity thereon, so that if the question arises they may be able to testify certainly as to the matter.

(2) Under the section, the Auditors' Report is to be attached to the balance sheet or referred to at the foot thereof. In the former case we consider that the attachment should be effected either by printing the two documents continuously on the same sheet of paper, or by fastening the Report to the balance sheet. We consider that the best mode of attachment is that the Report should be written or printed at the foot of the balance sheet, or endorsed thereon.

(3) If the Report is not attached to the balance sheet there should at the foot of the balance sheet be words referring to the Report, e.g., "The Report to the shareholders of Messrs....., the Company's Auditors, on the above balance sheet, is dated the.....day of..... and is open to inspection."

In our opinion it is for the Directors to make the reference and settle the form thereof, and not for the Auditors.

(4) In our opinion the Act does not impose on the Auditors the duty of seeing that the Report is attached to the balance sheet, or referred to at the foot thereof. This duty, we consider, is imposed on the Company and its Directors.

(5) It appears to us that it is not the duty of the Auditors to see that the balance sheet is signed by the required number of Directors. Sub-section (3) of Sec. 19 clearly contemplates that the balance sheet is to be issued after the Report has been made, for a copy is to be attached or referred to. As to cases in which there are no officers called Directors, the balance sheet should be signed by the manager or other person occupying the position of Director, for Sec. 30 of the Act of 1900, with which the Act of 1907 is to be read (see Sec. 52) provides that the term "Director" includes any person occupying the position of Director, by whatever name called.

(6) In our opinion it is not the duty of the Auditors to supply to shareholders, when requested, copies of the balance sheet and their Report, or furnish information to individual shareholders.

(7) In our opinion the statement in the form of a balance sheet referred to in Sec. 21 of the Act of 1907 is a document to be submitted by the Directors to the Auditors for audit. The document must contain, as the section requires, a summary of the Company's capital liabilities and assets, giving such particulars as would disclose the general nature of such liabilities and assets, and how the value of the fixed assets has been arrived at, but not necessary to include in it a statement of profit or loss. We consider that in many cases the last audited balance sheet will be a sufficient statement in the form of a balance sheet; but where the balance sheet does not state how the value of fixed assets has been arrived at, it would, in order to comply with the section, have to be supplemented by a note or memorandum stating how the value of such assets was arrived at.

Where the balance sheet, whether supplemented as aforesaid or otherwise, is adopted for the purposes of the section as a statement in the form of a balance sheet, it should in our opinion, be accompanied by a copy of the Report of the Auditors on such balance sheet; and if it is so supplemented, the Auditors should certify that according to the best of their information the method specified in the supplementary note or memorandum has been adopted.

We consider, however, that it is open to the Directors to frame the Statement "in the form of a balance sheet" referred to in Sec. 21 in more general terms than the balance sheet, provided that it complies with the requirements of the section; but in such case the statement must be audited by the Company's Auditors, and the result of the audit should be certified at the foot of the statement.

(8) As to the general duties of the Auditors, under Sec. 19 of the Act of 1907, we consider that they should perform these duties with due regard to the provisions of the Company's Articles of Association, in so far as those Articles are consistent with the Acts, and that they should call for all such information and explanations as they consider requisite to enable them to make Report to the shareholders contemplated by the section. They should not have the least hesitation in reporting fully as to any unsatisfactory features in the position.

Lastly, we do not consider that the Auditor's duties are limited to a comparison of the figures in the balance sheet and those in the books. No doubt, he has to examine the books, but, as Lord Justice Lindley said *In re The London and General Bank*, 1895, 2 Ch. D. 683, "he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the Company's true position. He must take reasonable care to ascertain that they do so."

Temple,  
13th March 1908.

R. B. FINLAY.  
FELIX CASSEL.  
A. R. KIRBY.  
FRANCIS B. PALMER.

Usually when the report is made in a short paragraph it is printed at the foot of the balance sheet as suggested in the opinion cited above, and in a case where a lengthy report is to be made out, a separate document is used with a due reference at the foot of the balance sheet. The late Sir Francis Gore-Brown in his book on *Joint Stock Companies* (Edn. 35, p. 348) recommends that:—

"If necessary, the auditors should add any special remarks, such as, 'No depreciation has been written off plant and machinery for the year'; 'The value of the stock-in-trade is certified by the Managing Director'; 'The item Securities and Investments includes 1,000 ordinary shares of £10 each of the A. B. Company, Limited, which is in liquidation'; or 'Under the heading mortgages and Loans is included interest accrued and due some of which is in respect of interest for—years prior to 1921'; or, 'At present price the investments of the company are not of the value shown above; but this does not affect the Profit and Loss Account, where only the interest actually received is credited.'"

On the question whether the auditors of a company are bound to check in course of audit all the securities, etc., held by the company either in its own possession or with a banker or in any other proper custody, the *City Equitable Fire Insurance*

*Company's case*, 1925, Ch. 407, affords an excellent guide. In this case *Romer J.* laid down to the effect that "the auditor is not, in his judgment, ever justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left. Wherever such personal inspection is practicable, and whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once; or, if his requirement is not complied with, to report the fact to the shareholders and this whether he can or cannot make a personal inspection." The question thus arose whether the securities in the hands of a banker, for which the company holds a safe custody receipt, would be the only evidence which an auditor should satisfy himself with, and whether securities which happen to be in the hands of a non-banker, such as the company's brokers, for which the company may hold a safe custody receipt or other acknowledgment, should also be inspected, or whether such a certificate from such a party should be considered satisfactory. The Appeal Court dealt with this point and the Master of Rolls in course of his judgment laid down as follows:—

"On the other hand, it may be said that it is the duty of an auditor not to take a certificate as to possession of securities unless from a person who is not only respectable—I should prefer to use the word 'trustworthy'—and also of that class of persons who in the ordinary course of their business do keep securities for their customers, and it may be said that a broker does not in the ordinary course of business keep securities for his customers, and therefore he is ruled out because the auditor ought not to accept from a person of that class, whether he be respectable or not, a certificate that he has got securities in his hands. Now, accepting the rule as stated, that it is right to find the securities in the hands of the bank whose business it is to hold securities, and applying the proviso that that bank must be one that is trustworthy, it seems to me that that rule may be a right rule to follow, and I think it is *prima facie*, but it is going too far to say that under no circumstances may you be satisfied with securities in the hands of a stock-broker, because it seems to me in the ordinary course of business you must from time to time, and you legitimately may, place in the hands of stock-brokers securities for the purpose of their dealing with them in the course of their business. with a large institution like the City Equitable

Company, with a very considerable amount of investments to make and investments to sell, it may well be that for the purpose of the convenience of all parties it may have been a useful method of business even if it had been examined with the most exiguous care, for the directors to decide that they would in the interests of their business leave securities of a considerable amount in the hands of their stock-brokers who, I suppose, at that time held a position not less trustworthy or respected than the City Equitable itself. I therefore do not wish in any way by anything that I say to discharge the auditors from their duties as laid down in the *Kingston Cotton Mill case*, far less do I wish to discharge them from their duty of seeing that securities are held and only accept the certificate that they are so held from a respectable trustworthy and responsible person, be that person the bank or be it somebody else but in applying my mind to the facts of this case I am not content to say that simply because a certificate was accepted otherwise than from a bank therefore there was necessarily so grave a dereliction of duty as to make Messrs. Langton & Leprie responsible. I think in the light of the evidence which has been given it is for the auditor to use his discretion and his judgment and his discrimination as to who he shall trust, indeed I think that is the right way to lay a greater responsibility on the auditors.

If you merely discharge him by saying he accepted the certificate of a bank because it was a bank you might lighten his responsibility. I think he must take a certificate from a person who is in the habit of dealing with and holding securities, and who he, on reasonable grounds, rightly believes to be, in the exercise of the best judgment, a trustworthy person to give such a certificate. Therefore I by no means derogate from the responsibility of the auditor, I rather throw a greater burden upon him, but at the same time, I throw a burden upon him in respect of which the test of common sense can be applied and common business habits can be applied, rather than a rigid rule which is not based on any principle either of business or common sense".

### **Remuneration of Auditors**

Remuneration of the auditors is to be fixed by the company in general meeting, except in a case where the auditors were appointed before the statutory meeting or to fill up a casual vacancy. Here the remuneration may be fixed by the directors (S. 144).

### **Failure to Appoint Auditors**

It is further laid down that in case an auditor is not appointed at the annual general meeting, the Central Government may appoint one on application of any member of the company and fix the remuneration to be paid to him by the company for his services (S. 144 (4)).

## CHAPTER XV

### WINDING UP OF COMPANIES

The winding up or liquidation of joint stock companies, by which companies incorporated under the Indian Companies Act of 1913 are wound up may be divided into three classes, *viz* :—

- (1) Winding up by the Court, ordinarily known as **compulsory** winding up,
- (2) **Voluntary** winding up, and
- (3) Winding up subject to **supervision** of the Court (S. 155).

This section further provides that the provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes. It may be here added that now under the new Sec. 207 voluntary winding up has been sub-divided into (1) **members'** voluntary winding up and (2) **creditors'** voluntary winding up.

#### **Winding up by the Court or Compulsory Liquidation**

The compulsory winding up is brought about through the medium of a petition to the Court. This petition may be presented either by the company itself, or by one or more of its members, or by one or more of its creditors. The grounds on which the company may be wound up, one or more of which may be taken in the petition, are the following :—

- (1) That the company itself has passed a **special resolution** to be so wound up.
- (2) That **default** is made in filing the Statutory Report or in holding the Statutory meeting.
- (3) That the company has **not commenced** its business within one year of its incorporation, or has suspended its business for a whole year.



- (4) That the **number** of the company's members is **reduced** below two (in the case of private companies), or below seven (in the case of any other company).
- (5) That the company is **unable to pay its debts**.
- (6) That the Court is of opinion that it is **just and equitable** that the company should be wound up (S. 162).

A company carrying on business in India exclusively, though originally incorporated in England, can also be wound up in India.

The same grounds are to be found in S. 168 of the **English Act**.

Over and above the six grounds given above by Sec. 162 there is a saving section (Sec. 218) where it is laid down that :—

*The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.*

### **Grounds for Compulsory Winding up**

The winding up through the Court naturally begins with a petition to the Court as a first step. We shall now examine each of the above grounds for compulsory winding up.

#### **(1) Company's own Resolution to Wind up**

The first ground for winding up, as we have seen above, is when the company has by special resolution of its own resolved that the company be wound up by the Court. Here the company itself takes the initiative, perhaps being harassed by its creditors, or, that considering everything, it is to its own interest to wind up. Generally speaking, compulsory winding up resolutions under this clause are very rare, because the usual course which the company takes is to resort to voluntary liquidation.

#### **(2) Default in Filing the Statutory Report**

The second ground is particularly open to a shareholder or contributory *viz.*, to petition for a winding up on the ground that there has been a default in filing the statutory report or in holding the statutory meeting. Section 166 (b) clearly lays down

that a petition for winding up on this ground shall not be presented by any person except a shareholder, and that too, not before the expiration of 14 days after the last day on which the meeting ought to have been held. The Court may, if the petition is successful, order the costs to be paid by persons who in the Court's opinion are responsible for the default (S. 170 (2)). Where the Court makes an order for the winding up of a company under this clause it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver (S. 170(3)). It may be further noted that the Court may, instead of directing that the company be wound up, order the statutory report to be filed or the meeting to be held or make such other order as may be just (S. 77(9)).

### **(3) Not Commencing Business or Suspending Business for One Year**

The third ground is the fact of the company not commencing its business within a year from its incorporation or of suspending it for a year. In this case it must be noted that there are circumstances under which non-commencement or suspension would not be considered by the Court a sufficient reason for making a winding up order, particularly where the majority of the members of the company wish to continue the business. In short this power of the Court is discretionary. In other words, this factor does not necessarily give the contributory or shareholder a vested right to a winding up order (*Metropolitan Rly. Warehousing Co.*, 1867, 36 L.J. Ch. 827).

### **(4) Number of Members less than the Minimum provided by Statute**

The fourth ground on which a petition for winding up of a joint stock company may be made is where the number of the company's members is reduced below two, in the case of private companies, or below seven, in the case of any other company. Under Sec. 147 of the Act, it has been provided that when the

membership falls below this above-mentioned minimum, and the company carries on business for more than six months with the number so reduced, the liability of every member aware of the fact would become unlimited and thus it is necessary that some remedy should be given to them to protect their own interest.

### (5) Unable to pay its Debts

In this connection Sec. 163 is important as it describes the circumstances under which the company shall be deemed to be **unable to pay its debts**. This section runs as follows :—

- (2) *The demand referred to in (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal advisor duly authorised on his behalf, or in the case of a firm, if it is signed by such agent or by a legal advisor or any one member of the firm (Amendment Act, 1936).*

### (6) Just and Equitable Clause

With reference to the petition for compulsory liquidation under Sec. 162(6) commonly known as the “just and equitable clause” it was the old law that the ground alleged under this clause ought to be one which is *ejusdem generis* with that of the preceding five clauses or sub-sections. It is now decided that this power of the Court to wind up was not so confined (*Loch v. John Blackwood*, 1924, A.C. 783). This case was followed in *Sabapathy Rao v. Sabapathy Press Co., Ltd.*, 1925, 48 Mad. 448. The test is whether at the date of the presentation of the petition for winding up there was any reasonable hope that the object of trading at a profit was attainable, the burden of proof being on the petitioner (*Davis Ltd. v. Brunswick Ltd.*, 1936 Comp. Cas. 227; see also *Bihar National Insurance Co's Case*, 1942, 12 Comp. Cas. 66).

There are various cases in which this just and equitable ground has been urged successfully from time to time, such as the ground that the substratum of the company is gone and that its

objects cannot be carried out (*German Date & Coffee Co.*, 1882, 20 Ch. D. 169; *Amalgamated Syndicates*, 1897, 47 Cal. 654); that there is a deadlock in the management and therefore it should be wound up (*Sailing Ship Kentmere Co.*, 1897, W. N. 58); that the company's business cannot be resuscitated (*Diamond Fuel Co.*, 1879, 13 Ch. D. 400); that a member who held all the shares acted as if the Company's assets were his private property (*Thomson v. Drysdale* (1925) S.C. 311); that the debenture-holders were carrying on the company's business for their own benefit (*Chic Ltd's Case* (1905) 2 Ch. 123); that the company's object was fraudulent (*T. E. Brinsmead & Sons Case* (1897) 1 Ch. 45).

In a case where the Court is satisfied that the substratum is gone and the case is an extreme one, the Court may order a compulsory winding up at the instance of the contributory, notwithstanding that he is not supported by the majority of shareholders. Here the only thing for the Court to decide is whether it is just and equitable that the company should be wound up (*In re Standard Aluminium & Brass Works, Ltd.*, 1928, 30 Bom. L.R. 1509). It was also held in a Calcutta case, viz., *in re Janbazar Manna Estate, Ltd.*, 1931, 58 Cal. 716 that to bring the petition within the just and equitable clause, it must be shown that the substratum is gone or that deadlock had arisen.

## THE PETITION

### (1) By a Shareholder or Contributory

When a petition is presented by the shareholders they should take up one or more of the first four grounds as laid down in Sec. 162. Here the Court will scrutinise the petition more closely. *In re The Pioneer Bank, Ltd. in re Chainrai Valeram*, 16 B.L.R. 508, it was laid down that where a petition for winding up a company compulsorily makes allegations relating to the internal management or mismanagement, the matter is not one that would call for the interference of the Court but is one for the shareholders themselves to deal with. It was further held that a petition by a

shareholder to wind up the company stands on a different footing as compared with a creditor's petition. A shareholder's petition should be scrutinised more closely on presentation. Further that the grounds taken by the shareholder in his petition should be either one or more of those laid down in sub-section 1, 2, 3, and 4 of Sec. 162, and that if any other grounds are alleged, the petition does not satisfy the requirements of the Act.

The same rule is partially laid down in Sec. 166 which runs as follows :

Provided that —

- (a) a contributory shall not be entitled to present a petition for winding up a company unless —
  - (i) either the number of members is reduced in the case of a private company, below two, or in the case of any other company, below seven, or
  - (ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months before the commencement of the winding up or have devolved on him through the death of a former holder,
- (c) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held

## (2) By the Company

The company may be wound up compulsorily through the petition of the company itself, for which purpose the company should pass a **special resolution** declaring that it should be wound up compulsorily. This course is not often adopted as it is more convenient to pass a resolution to wind up voluntarily.

## (3) By a Creditor or Creditors

When a petition is presented by a creditor or creditors it must be shewn that the debt for which the person is a creditor is

an existing debt which he or they can enforce against the company. Again it should be proved that the company is in an insolvent condition, though it is not absolutely necessary to prove that sufficient assets will be left to pay all unsecured creditors. This right of the creditor is not exactly an individual right, but it is a right which he is supposed to exercise in his representative character of a creditor or class of creditors and the Court may refuse the order if it is not likely to benefit the majority of the creditors (*Greenwood & Co's Case*, (1900) 2 Q.B. 306), or if a majority in value of the creditors oppose the petition (*Chapel House Colliery Co's Case* (1893) 24 Ch. D. 259).

The assignee of a debt may also petition (*Paris Skating Co's Case* (1877) 5 Ch. D. 959) but this assignment by the creditor concerned must have been made before the petition was lodged. A debenture-holder whose debt has become due may present a petition, but a trustee on behalf of debenture-holders cannot petition as he is not considered to be a creditor (*Uruguay Central Rly Co's Case* (1879) 11 Ch. D. 372). The prospective or contingent creditor may not petition until such security for costs has been given as the Court thinks reasonable, and until a *prima facie* case for winding up has been established to the satisfaction of the Court (S. 166).

### Registrar's Petition

Under the Indian Companies (Amendment) Act of 1936 the registrar of companies is now given the right to petition with the **previous sanction of the Central Government**, obtained before presentation of the petition. Before such sanction is given the company must be given an opportunity to be heard. The **only ground** on which the registrar can petition is that from the financial conditions of the company as disclosed in its balance sheet or from the report of an inspector appointed under Sec. 138 it appears that the company is unable to pay its debts (S. 166 (1) (a)).

### Proceedings in Connection with the Petition

The rules of the High Courts lay down that every petition for compulsory liquidation, or supervision winding up, shall be

advertised fourteen days before the hearing stating the date on which the petition was presented and the names and addresses of the petitioners and their attorney, if any. A copy of such a petition has to be served at the registered office of the company, if any, and where there is no registered office, at the principal or last-known principal place of business of the company, or on a servant of the company that may be found there. This petition must be verified by affidavit. Every creditor or contributory of a company is entitled to have a copy of this petition on paying at the rate of eight annas per folio of ninety words. All persons certifying the petition, as well as every creditor or contributory, is entitled to appear in order to support or oppose the petition in Court.

The Court after hearing the petition may pass an order granting it, or may reject it with costs. If the Court passes an order the **winding up** of the company **shall be deemed to commence at the time of the presentation of the petition**. This rule will apply even where the compulsory order was passed to supersede the voluntary winding up. As soon as the order is passed, it shall be advertised by the registrar in the Official Gazette, and shall be served on such persons or person as the Court directs. As soon as the petition is presented, the Court may at any time it likes, pass an order restraining all proceedings of suits that might have been filed against the company, which order is confirmed and made permanent after the winding up order is completely made (Ss. 16, and 173). As soon as this order is made it will be the duty of the company to file with the registrar a copy of the compulsory order. The Court then considers the order further in Chambers on a summons. The Court then appoints a person or persons as official liquidator or liquidators. If more than one person is appointed, the Court declares whether any act, which in law is required or authorised to be done by the official liquidator, is to be done by all or any one or more of such persons. The official liquidator may have to give security as the Court directs. Where security is asked for and given according to the directions of the Court, the Prothonotary of the High Court or the District Judge certifies it.

### The Official Liquidator

The official liquidator shall be described by the style of "official liquidator of..... Co., Ltd., in liquidation" and not by his individual name (S. 177). Immediately on his appointment he takes into his custody and control all the property, effects and actionable claims, to which the company is, or appears to be, entitled. This property will be technically considered to be in the custody of the Court even where no official liquidator is appointed, or during any vacancy in such appointment (S. 178).

Under the Indian Companies (Amendment) Act of 1936 a new section has been added to our present Act, *viz.*, Sec. 177A by which it is laid down that where the Court has made a winding up order or appointed an official liquidator provisionally, the persons who are at the relevant date the directors, secretary, manager or chief officer of the company shall, unless the Court otherwise orders, make out and submit to the official liquidator a **statement** as to the affairs of the company verified by an affidavit containing the particulars as to (a) the assets of the company, stating separately the cash balance in hand and at the bank if any (b) debts and liabilities, (c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in case of secured debts particulars of securities, their value and the dates when they were given, (d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

The statement has to be **submitted within 21 days** from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint. These persons making such statements may be paid out of the assets of the company such costs and expenses as may have been incurred in its preparation or making of which the official receiver may consider reasonable, subject to an appeal to the Court. Those who without reasonable cause knowingly and wilfully make default in complying with the requirements of this section are liable to a fine not exceeding Rs. 100



for every day during which the default continues. This statement can be inspected by any person stating himself in writing to be a creditor or contributory of the company and such person may take a copy thereof or extract therefrom. It will thus be noticed that the law has been amended in this connection because in the past considerable difficulties were experienced by liquidators due to apathy and negligence on the part of directors in furnishing particulars of the affairs of the company.

After receiving the above statement as provided for by Sec. 177A, the official receiver shall, under Sec. 177B, within four months (or with the leave of the Court six months) from the date of the order, prepare and submit to the Court a preliminary report. This **preliminary report** should state the amount of capital issued, subscribed and paid-up and the estimated amount of the assets and liabilities of the company in liquidation, giving separately under the heading of assets particulars of—

- (i) cash and negotiable securities;
- (ii) debts due from contributories;
- (iii) debts due to and securities, if any, available to the company;
- (iv) moveable and immoveable properties belonging to the company;
- (v) unpaid calls.

Where a company has failed in the above case, the information or the statement should also contain details as to the cause of failure and whether in the opinion of the liquidator a further enquiry is desirable as to any matter relating to the promotion, formation or failure of the company, or the conduct of the business thereof. Besides this preliminary report it is further provided that the official liquidator may, if he thinks fit, make a further report stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promo

tion or formation, or by any director or other officer of the company in relation to the company since the formation thereof and any other matters which in his opinion it is desirable to bring to the notice of the Court.

The **official liquidator** is an official of the Court as distinguished from the liquidator in a voluntary liquidation, who is an agent of the company. He occupies a fiduciary position and should not therefore make any profit out of his position. He represents the creditors' and contributories' interests alike, and has to deal with them evenly. In fact, his **duties and responsibilities** relate to three parties, *viz.*, (1) the Court, (2) the creditors and (3) the contributories. Thus while the liquidator is acting, if any person interested in the company's affairs calls for inspection of the company's books or papers, it is the duty of the official liquidator to give him all assistance. He should also avoid litigation as far as possible, particularly where no substantial ground of dispute exists. Of course, he is given all discretion in the management of the assets of the company and in connection with their distribution. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court, to assist him in the performance of his duties. The only restriction is that where the official liquidator is an attorney, he cannot appoint his partner, unless the said attorney-partner consents to act without remuneration (S. 181).

### **Powers and Duties of Official Liquidators**

The **powers** of the official liquidator are laid down by the Indian Companies Act in Sec. 179 which powers he has to exercise with the sanction of the Court. Of course the Court may, as provided for in Sec. 180, give an order under which the official liquidator may exercise any of the powers under Sec. 179 without the sanction or intervention of the Court; and in the case of a provisional liquidator, the Court may restrict his powers by the order appointing him. The powers according to Sec. 179 are as follows:—

- (1) To institute and defend suits;
- (2) To carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
- (3) To sell the moveable and immoveable property of the company by auction or by private contract;
- (4) To execute in the name of the company, deeds, receipts and other documents and for this purpose to use the company's seal;
- (5) To claim and prove in the insolvency of any contributory for any debt due from the insolvent to the company;
- (6) To draw, accept, make or endorse a bill of exchange, *hund* or promissory note on behalf of the company,
- (7) To raise on security of the assets of the company any money required for the purpose of liquidation,
- (8) To take out in his official name letters of administration of any deceased contributory and to do any other act necessary for obtaining payment of money due from the contributory or his estates which cannot be conveniently done in the name of the company;
- (9) To do all such other things as may be necessary for the winding up of the company and distributing the assets.

These duties and powers are naturally supplemented by the rules of the various High Courts which have to be taken into consideration while arriving at an opinion on the point. We have seen that the liquidator can carry on the business of the company so far as is necessary for the beneficial winding up of the company. The business cannot be carried on simply with a view to make the shares more valuable (*Wreck Recovery Co.*, 1880, 15 Ch. D. 353). Of course the business cannot also be carried on with a view to profit (*Ex parte Emmanuel*, 1881, 17 Ch. D. 35).

### **His Accounts**

The official liquidator shall with all convenient speed after his appointment, make up, continue, complete and rectify the books of accounts as the Court may direct. Besides this, he should keep a

book called "Record Book," in which the minutes of the proceedings at meetings of creditors and contributories should be kept. This book shall be open for inspection of any creditor or contributory, subject of course to the control of the Court (S. 182). The accounts of the official liquidator are to be filed at such time as the Court may direct and should be verified as ordered. All moneys, bills, *hundis* and other securities paid and delivered into the banks of Bengal, Madras and Bombay, or any branch thereof, shall be subject to the orders of the Court (S. 189).

### Exercise and Control of Liquidator's Powers

It is also laid down by the Act that subject to the provisions of the Act, the official liquidator of the company which is being wound up by the Court shall in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any **directions** that may be given by **resolutions of creditors or contributories** at any general meeting. These meetings may be summoned by the official liquidator on his own initiative, and when he thinks desirable for the purpose of ascertaining the wishes of these two classes interested in the winding up : but where these creditors and contributories, by the resolution, direct or request him to do so by one-tenth in value of creditors or contributories as the case may be, it shall be his duty to summon such meetings. The official liquidator has the right, if he so desires, to apply to the Court, in the manner prescribed, for direction in reference to any particular matter arising in winding up. He is given this discretion which he makes use of subject to the provisions of the Act in the administration of the assets of the company and in the distribution thereof among the creditors. The Act also provides that if any person is aggrieved by any action of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just in the circumstances (S. 183).

**Private Examination**

In the case of private examination, the Indian Companies Act lays down that the Court may, at any time after the winding up order is made, summon before it any officer of the company or person who is known or suspected to have in his possession any property of the company, or who is supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company. During this examination the Court may examine the person so summoned **on oath** either orally or through written interrogatories and may reduce the answers to writing, requiring him to sign it. The Court may also require him to produce any documents which may be in his custody or power relating to the company. If the person so examined claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien. The attendance is compulsory, and if the person summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed without having a lawful impediment which is made known to the Court at the time of sitting and allowed by it, the Court may cause him to be apprehended and brought before it for examination (S. 195). This is a section providing for what is called a private examination as distinct from the public examination of officers which is of a penal nature.

In the private examination the only **object** sought to be achieved is to provide the liquidator with information (1) in connection with the assets of the company with a view to enable him to determine how to act in liquidation, or (2) where the liquidator suspects from his examination of books and papers of the company or otherwise that there is some ground for action under Sec. 235 for misfeasance, or (3) where proceedings are pending against the company and the liquidator wants to ascertain whether it is safe for

him to depend or proceed with the action, or (4) where he wants to find the circumstances under which a person became a member or ceased to be, where in his opinion these circumstances are material, or (5) where a contributory who is in default cannot be found.

The examination, as the heading suggests, is of a purely private character and its proceedings, or information obtained therefrom, cannot be disclosed without the permission of the Court, because an unauthorised publication will amount to contempt of the Court (*Re London and Northern Bank, Haddock's Case*, 1902, 2 Ch. 73; *American Exchange in Europe v. Gillig*, 1889, 58 L.J. Ch. 706). Usually this examination is made on the application of the liquidator in compulsory winding up, but a creditor or contributory may apply after giving notice to the liquidator.

### Public Examination of Officers

After the winding up order, the official liquidator, if he finds on investigation of the affairs of the company, that in his opinion a **fraud** has been committed by any person in the promotion or formation of the company, or in relation to the company since its formation, may apply to the Court, and the Court will direct such person to attend on the date appointed, to be **publicly examined** as to the formation or promotion or conduct of the business of the company, and as to the conduct of any director, manager or officer of the company. These public examinations are held **only in case of a company which is wound up by order of the Court**.

In this examination the official liquidator takes part and may, with the sanction of the Court, employ legal advisers. Any creditor or contributory may also take part in such examination with or without legal assistance. In this examination the person summoned will be **examined on oath** and shall answer all such questions that the Court may put or allow to be put to him. The said person examined will have the liberty to employ at his own expense any lawyer entitled to appear before the Court, who may put to him such questions as the Court may deem just for the

purpose of enabling him to explain or qualify any answers given by him. The **notes** of this examination will be taken in writing, and at the close of the said examination, they will be read over to or by the person examined, who will have to **sign** them. These notes will be **used in evidence** against the said person in **any civil proceedings** that may be taken against him, and they shall be also open to the inspection of creditors and contributories at all reasonable times. Where the party so accused is found to be innocent by the Court and exculpated from any charges that may have been made or suggested against him, the Court may allow such costs as in its discretion it may think fit (S. 186). It has been held in England that these costs are generally allowed only where there are assets of the company out of which they can be paid. The official liquidator (**in England known as Official Receiver**) cannot be made to pay these costs personally (*Re John Twiddle & Co*, 1910, 2 K.B. 67). It may be added here that under Sec. 215 of our Act a voluntary liquidator can apply to the Court for examination of persons connected with the management of the company (*Sirdar Nowroji Pudumji v. Sadasiv Ramchando Nulu* 44 Bom. 459).

### Meetings

In case of compulsory winding up, the Court may have regard to the **wishes of the creditors and contributories** as to all matters relating to the said winding up, and may for that purpose direct meetings of creditors and contributories to be called. These meetings are to be held and conducted according to the **directions of the Court**, and at such meetings the Court may appoint any person to act as chairman in order to report the results of the same to the Court. In the case of creditors in these meetings, regard shall be had to the value of each creditor's debt; whereas, in the case of contributories, regard shall be had to the number of votes conferred on each contributory according to the articles (Ss. 174 and 239). These sections may be given effect to by the Court through the medium of its rules specially framed; which power is

reserved to every High Court in connection with (1) holding and conducting of meetings to ascertain the wishes of creditors and contributories, (2) settling the list of contributories and rectification of the register of members and collecting and applying assets, (3) requiring delivery of property or documents to the liquidator, (4) making of calls, and (5) fixing a time within which debts and claims must be proved (S. 246).

Besides this, the **official liquidator himself** is given **power to summon** general meetings of creditors or contributories on his own initiative, for ascertaining the wishes of creditors and contributories. He is also compelled to hold, as a matter of duty, meetings of creditors and contributories where such creditors or contributories by resolution have directed, or whenever he has been requested in writing to do so by one-tenth in value of the said creditors or contributories. In the administration of the assets and the distribution thereof among the creditors, the official liquidator shall have regard to the directions that may be given by the resolutions of creditors or contributories at any general meeting so far as they do not violate the provisions of the Act (S 183). When such meetings are called, either through the orders of the Court, or by the official liquidator, seven days' notice must be given in writing to every creditor or contributory as to the time and place appointed for such a meeting, and as to the matter upon which the wishes of the creditors or contributories are to be ascertained. These meetings may be advertised if the Court so directs, in the Gazette, and in any other newspapers that may be named. The voting at this meeting shall be either personally or by proxy, but no creditor shall appoint a proxy who is not a creditor of the company, whose debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company. The chairman of a meeting summoned by the directions of the Court must report the result of it to the Court.

### **Settling List of Contributories**

One of the duties of the official liquidator is to settle the list of contributories. In this connection he is to follow the rules, if



any, made by the High Court under whose jurisdiction he has been working. A **contributory** is defined as every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory (S. 158). The persons who are liable to be put down as contributories are present and past members who are considered to be liable to contribute to the assets of the company to an amount sufficient for payment of the company's debts and liabilities *plus* costs, charges and expenses of the winding up, including the amounts, if any, required for adjusting the rights of contributories among themselves.

The **present members** of course are **primarily liable**, and in selecting them the official liquidator has to ascertain, first whether the company is a limited or unlimited concern. If the company is a limited company, the members who have paid up their amount of shares up to the full limit of their obligations shall not be required to pay any more. It should be further added that if a company owes to any of its members a debt in his character as a member, either by way of dividends, profits, or otherwise, it shall not be deemed to be a debt payable to that member in competition between the said member and an outside creditor. The said sum may, however, be taken into account for the purpose of final adjustment of rights of contributories among themselves.

A **past member** who has ceased to be a member for more than one year before the commencement of the winding up is not liable to contribute. Neither is he liable to contribute towards any debt or liability which was contracted after he ceases to be a member. With regard to those past members who ceased to be members within a period of one year before the commencement of the winding up, they shall be liable to contribute only where it appears to the Court that the existing members are unable to satisfy the contributions required to be made (S. 156).

Further, in the case of limited companies, **where the directors' liability is unlimited**, they shall be made liable to contribute to their last penny as contributories, with the exception that a past director who has ceased to hold office for a year or upwards before the commencement of the winding up, shall not be liable, neither shall past directors be liable to contribute towards debts incurred after they ceased to hold office (S. 157). The liability of a contributory creates a debt accruing at the time when his liability commences, but it is payable when calls are made for enforcing the liability (S. 159). In case a contributory **dies** before or after his name has been placed on the list of contributories, his legal representative or his heirs shall be liable in the due course of administration of his assets, and they shall be made contributories accordingly. If the legal representatives and heirs of a deceased member fail to pay any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory with a view to compelling payment of the money due (S. 160). In the case of the **insolvency of a contributory**, his assignees shall represent him for all the purposes of winding up and be contributories accordingly. In this connection the value of liabilities as to the present and future calls will be estimated and proved against the estate (S. 161).

The official liquidator shall, with all convenient speed after his appointment, or at such time as the Court directs, make out and file in the Court a list of the contributories of the company which is to be verified by an affidavit of the official liquidator. This list shall state as far as possible, the respective addresses of, and the numbers of shares or the extent of interest contributable to each such contributory, and distinguish the several classes of contributories. The list of contributories should next be filed in Court. The official liquidator shall then obtain an appointment for settling the said list, and shall give notice in writing of such appointment to every person included in such list stating in what character and for what number of shares or interests such person is included in such list. These notices must be served four clear days before

the date appointed to settle the list. The list will then be settled. The official liquidator must then give notice to every person who is finally placed on the list settled, stating in what character he is so placed and the number of shares or extent of interests thereof. The notice shall also state that if any application for removal of a name, or for any variation of the list is to be made, the same must be made to the Court within thirty days from the date of the service on the contributory of the notice to that effect.

### **Calls in Liquidation**

The Court may at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make orders for the payment of calls. These calls are to be made with a view to collect money which the Court considers necessary in order to satisfy the cost and expenses of the winding up and for the adjustment of the rights of the contributories among themselves. But the making of the calls is entirely at the discretion of the Court, and it does not use this discretion in favour of such a course unless it is satisfied that the assets in the hands of the liquidator are not sufficient. Every application made by the official liquidator to the Court in order to make a call on contributories, or any of them, for any purpose authorised by the Act shall be made by summons in Chambers stating the proposed amount of such a call; and such summons shall be served four clear days at the least before the day appointed for making the call, on every contributory proposed to be included in such call, or if the Court so desires, an advertisement may be published giving notice as to the intended call. When the call is made the payment of the amount due from each contributory may be enforced by the order of the Court and may be executed as if it were a decree of the Court for money. A copy of the order making the call should be served forthwith upon each contributory, together with a notice from the official liquidator specifying the amount or the balance due from all such contributories.

### **Compromises**

As to compromises in connection with joint stock companies three sections are of particular importance. The first is Sec. 234 which can be put into operation only when the company is being wound up either by or under the supervision of the Court or voluntarily. The second is Sec. 215, and the third is Sec. 153 where the power is given to companies to enter into compromises or arrangements without being in liquidation. We shall now deal with each separately.

Section 234 is virtually speaking a section dealing with some of the general powers which a liquidator may exercise in the course of winding up of a company. If the company is being wound up by or under the supervision of the Court, these powers can be exercised by the liquidator with the sanction of the Court, whereas in the case of a voluntary winding up, the sanction of an extraordinary resolution of the company is necessary. With this sanction the liquidator may:—(1) pay any class of the company's creditors in full, (2) make compromises or arrangements with its creditors and (3) make compromises with the debtors where such debts arise as a result of calls or otherwise. The exercise of the powers of this section by the liquidator is subject to the control of the Court with the result that any creditor or contributory has a right to apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Section 215, on the other hand, speaks of an arrangement entered into between a company about to be or in course of being wound up, and its creditors. This section is applicable both to members' voluntary winding up and also to creditors' voluntary winding up, and although the word "voluntary" is not used, the section clearly **applies to every voluntary winding up** and is not applicable to compulsory winding up. Under this section any arrangement which may have been entered into between the company which is about to be wound up or is in course of being wound

up, and its creditors, subject to the right of appeal under this section shall be binding on the company, provided it is sanctioned by an extraordinary resolution. It will also be binding on the creditors if the compromise is acceded to by three-fourths of the number and value of the creditors. With reference to the right of appeal it is laid down that any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

With reference to a compromise under Sec. 153 where the power is given to the company to effect it without being in liquidation, it is provided that where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may on application in a **summary way** of the company, or of any creditor or member of the company or in the case of a company being wound up, of the liquidators of creditors, order a **meeting** of the creditors or class of creditors, or of the members or class of members as the case may be, to be called, held and conducted in such manner as the Court directs. If at this meeting a **majority in number representing three-fourths in value** of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy, agree to any compromise or arrangement, if sanctioned by the Court, it shall be binding on all the creditors or members and on the company. In the case of a company in course of being wound up, the said compromise shall be binding on the liquidator and contributories of the company. It has been further laid down that in case of such a compromise, the order made by the Court will have no effect until a certified copy of it has been filed with the Registrar, and that a **copy** of every such order must be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the

company. Any default in this connection in complying with the filing of the order will entail a fine not exceeding Rs. 10 for each copy in respect of which the default is made, on the company and every officer of the company who is knowingly and wilfully in default.

### **Reconstruction, Amalgamation or Absorption**

We have seen under the previous heading that the company can make a compromise or arrangement with its creditors or any class of them, or between itself and its members or any class of them, under Sec 153. Where this compromise or arrangement was made for the purpose of amalgamation or reconstruction or absorption under the old law as it stood, the companies had frequently to resort to winding up, as there was no means of avoiding it. In order to avoid this and **to simplify the process of reconstruction or amalgamation and absorption**, the Greene Committee of 1925-26 strongly recommended in England that a section such as Secs 153A and 153B of the Indian Companies (Amendment) Act of 1936 should be inserted in the English Companies Act, with the result that sections similar to the above sections were inserted in the English Act, which we adopted thereafter.

The method as laid down now by these new sections of our Act makes, in case of the amalgamation of companies for the preservation of the name and the good-will of the company or companies concerned, at the same time it avoids winding up. This method also saves an amount of unnecessary expenditure which the compulsory winding up of the absorbed company through the usual process of winding up involved. Thus the compromise as laid down by Secs. 153A and 153B can be carried out and applied to compromises in case of companies **not in the course of being wound up**. Here if, after going through the process as laid down in Sec 153 which we considered above, an application is to be made to the Court under the said section for the sanction of the compromise or arrangement proposed between a company and any

persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been made for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking, or the property of any company concerned in the scheme is to be transferred to another company, the Court is authorised to make one or more of the orders as we have stated below. Here it may be added that the company transferring is called the **"transferor company"** and the other company to whom the undertaking or property is to be transferred is known as the **"transferee company."**

The Court is authorised to make provision for all or any of the following matters —

- (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ,
- (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ,
- (d) the dissolution, without winding up, of any transferor company ,
- (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement ;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amal-

gamation shall be fully and effectively carried out (S. 153A (1)).

When the order under Sec. 153A (1) provides for a **transfer of property or liabilities**, the said property shall be transferred to and vest in, and those liabilities shall be transferred to and become liabilities of, the transferee company. In the case of any property which is directed by the order to be free from any charge which is, by virtue of the compromise or arrangement to cease to have effect, the same shall be free (S. 153A (2)). A certified copy of the order has to be delivered to the Registrar for registration within 14 days after the completion thereof. If default is made in complying with this, the company and every officer of the company knowingly and wilfully in default shall be liable to a fine not exceeding Rs. 50. The property under this section includes property, rights and powers of every description, and liabilities will include duties. The word "**company**" as used in Sec. 153 (4) will not include any company other than a company within the meaning of the Indian Companies Act.

If a scheme or contract which **involves the transfer of shares** or any class of shares in a company (i.e., the transferor company) to any other company, whether the said company is a company within the meaning of this Act or not, has within four months after the making of the offer by the transferee company been approved by the holders of not less than threefourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given, the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme of the contract, the shares of the approving shareholders are to be transferred to the transferee company.



Where, however, any such scheme or contract was approved at any time before the commencement of the Indian Companies (Amendment) Act of 1936, the Court has the power at its discretion, by an order on an application made to it by the transferee company within two months after the commencement of that Act, to authorise notice to be given under this section at any time within fourteen days after the making of this order in which case Sec. 153B shall apply, except that the terms on which the shares of the dissenting shareholders are to be acquired shall be on such terms as the Court may by the order direct, instead of the terms provided by the scheme or contract.

When a notice has been given by the transferee company under this Sec. 153B and the Court has not, on application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of that notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of Sec 153B the company is entitled to acquire. Upon this the transferor company must register the transferee company as the holder of its shares. All the money received by the transferor company under this section must be paid into a separate bank account and any other sums or any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other considerations were received. The dissenting shareholder here includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

### **Amalgamation or Reconstruction in Voluntary Winding Up**

In case of amalgamation in connection with voluntary winding up or reconstruction, Sec. 208C is the most convenient section. This section runs as follows :—

(1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called the transferee company) the liquidator of the first mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests or in addition thereto participate in the profits of, or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereinafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject matter of the arbitration shall apply to all arbitration in pursuance of this section (Amending Act, 1936).

The above section gives complete power of a special type for sale of the business in winding up, and further, Secs. 212 (1) (c) and 179 (c) give the liquidator the power to sell the undertaking of the company, either privately or by public auction, to any person or company for cash without sanction of the Court or of a general meeting; whereas under Sec. 208C the liquidator in voluntary liquidation can, with the sanction of a special resolution, sell the property for shares in another company in lieu of cash. Thus, as this section affords a greater facility for sale or transfer, and thus for reconstruction and amalgamation of two or more companies, it is a most handy section (*Purshuram v. Tata Bank*, 1921, 26 Bom. L.R. 987). However, a company cannot, without regard to Sec. 208C, sell the business to another company for shares under powers given in its memorandum of association, by excluding a member's statutory right to dissent (*Bisgood v. Henderson's Transvaal Estates*, 1908, 1 Ch. 743; *Etheridge v. Central Uruguay Co.*, 1913, 1 Ch. 425). The important part of the section in connection with reconstruction or amalgamation under it, is sub-section (5) which lays down that a special resolution is not invalid because it is passed before or concurrently with the resolution for winding up the company or for appointing liquidators. This passing of two concurrent resolutions does not make both invalid simply because the resolution for reconstruction which was subsequently passed was invalid (*Thompson v. Henderson's Transvaal Estate*, 1908, 1 Ch. 765). The sale must be to a company or to any agent or trustee for a company to be formed and not to an individual (*Re Hester & Co.*, 1875, 44 L.J. Ch. 757, *Bird v. Bird's Patent Sewage Co.*, 1874, 9 Ch. App. 358).

### **Disclaimer of Onerous Assets**

Section 230A which corresponds to S. 267 of the English Act of 1929, confers a power on the liquidator in any winding up to disclaim, **with the leave of the Court** and subject to the provisions of the section, by **writing signed** by him, at any time **within 12 months** after the commencement of the winding up,

any part of the property of the company which consists of land burdened with **onerous** covenants, of shares or stock, of unprofitable contracts or of any other property which is unsaleable. The liquidator may exercise this power even though he had attempted to sell it or had taken possession of it, or had exercised any right of ownership in relation to it. The Court may, before or while granting leave, require notices to be given to persons interested in the property concerned.

The section provides that where any such property has not come to the knowledge of the liquidator within one month of the commencement of the winding up, he may disclaim it any time within 12 months after he has become aware of the property.

If, however, an application in writing has been made to the liquidator by any person interested in the property requiring the liquidator to decide whether he will or will not disclaim the property concerned, and if the liquidator has not, within 28 days after receipt of the application given notice to the applicant that he intends to apply to the Court for leave to disclaim the property concerned, the liquidator cannot exercise his right for leave to disclaim. In the case of a contract unless the liquidator definitely disclaims it within the 28 days the company shall be deemed to have adopted it.

### **Preferential Payments**

In connection with winding up after the secured creditors are paid out their security, and subject to the retention of such sums as may be necessary for the costs and expenses of winding up, certain unsecured creditors known as preferential creditors have to be paid in priority to other unsecured creditors. In this connection Sec. 230 is important and lays down as under :—

Sec 230 (1) In a winding up there shall be paid in priority to all other debts —

- (a) all **revenue, taxes, cesses and rates**, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date,

- (b) all **wages or salary of any clerk or servant** in respect of service rendered to the company within the two months next before the said date not exceeding one thousand rupees for each clerk or servant,
- (c) all **wages of any labourer or workman**, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date,
- (d) compensation payable under the **Workmen's Compensation Act, 1923** in respect of the death or disablement of any officer or employee of the company;
- (e) all sums due to any employee from a **provident fund**, a pension fund or gratuity fund or any other fund for the welfare of the employees maintained by the company, and
- (f) the expenses of any **investigation** held in pursuance of clause (ii) of S 138 of this Act

(2) The foregoing debts shall—

- (a) **rank equally** among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions, and
- (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge

(3) **Subject to the retention** of such sums as may be necessary for the **costs and expenses of the winding up**, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company, within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The **date** hereinbefore in this section referred to is—

- (1) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order, and
- (2) in any other case the date of the commencement of the winding up

### **Unsecured Debts of Creditors**

After paying the preferential creditors, the next step for the liquidator to take is to distribute the surplus among all ordinary creditors. The rules of various High Courts provide in one form or other procedure as to the listing of these debts, passing of them and then paying them in instalments known in technical language as "dividends" of so much per rupee or so much per pound after due notice. The unsecured creditors naturally rank *pari passu*, i.e., on equal footing. In case of interest, the rules of High Courts generally provide that debts and claims which carry interest shall be entitled to receive dividends on what was due on principal and interest at the date of winding up. The creditors whose debts and claims are barred by limitation should not be paid.

### **Distribution among Contributories**

After the payment of all creditors and debts as well as costs charges and remuneration of the liquidator in full, contributories have to be paid and for this purpose the rights of contributories must be adjusted.

In a case of compulsory liquidation Sec. 192 applies, where it is laid down that the Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto. The guiding principle here will be that a shareholder or contributory cannot participate in any distribution of assets unless he has paid all calls made on him (*Grissell's Case*, 1866, 1 Ch 528). After all the contributories are paid in full, if a surplus remains, then that surplus will have to be distributed according to the rights of the contributories as laid down by the articles of association and the memorandum of the company concerned. Here a fully paid shareholder can come in and claim to

be placed on the list of contributories for the purpose of having his rights adjusted as between himself and other contributories not fully paid (*Anglesea Colliery Co.*, 1866, 1 Ch. App. 555; see also *Driffeld Gas Light Co.*, 1898, 1 Ch. 451). The distribution or adjustment in this case is made on the footing of the nominal amount of shares and not according to the actual amounts paid up, and where a certain number of shareholders are paid more than the others, the Court interferences and adjusts the amount until all are paid in the same proportion and thereafter the surplus is distributed in proportion to the nominal amount of the share (*Re Hodge's Distillery Co., ex parte E. Maude*, 1870, 6 Ch. App. 51; *In re Driffeld Gas Light Co.*, 1898, 1 Ch. 451; *re Wakefield Rolling Stock*, 1892, 3 Ch. 165). This adjustment may be made either by making larger payments to those who have paid larger amounts or by making calls (See *re Hodge's Distillery Co.'s Case*; also *Wakefield Rolling Stock Case* cited above; *Re Anglo-Continental Corporation of Western Australia*, 1898, 1 Ch. 327).

Where shares carry preferential rights both as to dividend and capital these shares must be paid up in priority to any amount that may be payable to other shareholders of other classes which are deferred to those preference shares. If, on the other hand, they are not preferential as to capital, they of course, rank equally with ordinary shareholders in connection with the distribution of the surplus among contributories.

### Pending Liquidation

According to S. 244, when any winding up is **not concluded within one year** after its commencement, the liquidator must **file**, once in each year and at intervals of not more than 12 months, in Court or with the Registrar as the case may be, a statement in the prescribed form with respect to the proceedings in and position of the liquidation. If the statement is filed in Court a copy must be filed simultaneously with the Registrar. Such statement is to be **open for inspection** by any creditor or contributory of the company at

all reasonable times on payment of the prescribed fee, and he may also obtain a copy or extract if so desired.

### **Payments Into Bank**

S. 244A imposes on the liquidator in any winding up a duty to open a **special banking account** and pay all sums received by him as liquidator into such account. Under the **English Act** unless special leave is obtained from the Board of Trade to keep an account at a local bank, the liquidator must pay all moneys received by him into the Companies Liquidation Account at the Bank of England.

In a **compulsory** winding up under the Indian Act, the money must be paid into a scheduled bank.

A liquidator in any winding up **cannot retain** a sum exceeding Rs. 500 (£50 under the **English Act**) for more than 10 days without a valid reason. If he does so retain it and is unable to give a satisfactory explanation to the Court (the Board of Trade in **English law**), he will be charged with **interest** at the rate of 20 per cent per annum on the amount so retained in excess and in addition his remuneration will be disallowed and he may be removed from his office and held liable for any expenses caused by his default.

### **Unclaimed Dividends etc.**

A new section, *viz.* S. 244B was introduced by the Amending Act of 1940 by which the liquidator must pay to the credit of the Companies Liquidation Account of the Reserve Bank of India (The Bank of England under the **English Act**,) any money in his hands or under his control representing unclaimed or undistributed assets or dividends which have remained unclaimed or undistributed for six months.

Any persons entitled to participate in the sums so paid into the Companies Liquidation Account may apply to the Court for an order for payment to them of any of these sums due to them.



### **Termination of Winding Up**

In connection with this, the rules of various High Courts provide that upon termination of proceedings for winding up of a company, the official liquidator shall bring in his balance sheet of receipt and payments verified by his affidavit and that he shall pass his account, and that the balance, if any, due on final account shall be certified by the judge and that the payments by the official liquidator out of the said balance, if any, may be made in such manner as the judge directs. In this case the recognizances entered into by the parties may be vacated. After the passing of accounts the official liquidator may apply for an order that the company be dissolved from the date of such order. Here Sec. 242 of the Indian Companies Act also lays down that when the company has been wound up and is about to be dissolved, the **documents** of the company with the liquidators may be disposed of either (1) in case of a winding up by or subject to the supervision of the Court in such way as the Court directs or (2) in case of voluntary winding up in such a way as the company by extraordinary resolution may direct

**After three years** from the dissolution of the company **no responsibility** shall rest on the company or the liquidators or any person to whom the custody of the documents has been committed by reason of the same not forthcoming, by any person claiming to be interested therein. Usually the rules provide that the procedure of the winding up of the company after the winding up is completed should be that the file and books containing the official liquidator's account be deposited in the records of the Court

### **Remuneration of the Official Liquidator**

The remuneration of the official liquidator is fixed by the Court. The Bombay High Court Rules have fixed the following scale in Rule 712 which is to be followed unless otherwise ordered by the Judge :—

Upon total assets, including produce of calls on contributories, realised or brought to credit, and not being moneys received and spent on carrying on the business —

	In High Court.	In subordinate Courts
On the first Rs. 10,000 or fraction thereof	5%	3¼%
On the next Rs. 15,000 do	3%	2¼%
On the next Rs. 25,000 do	2½%	1¾%
On the next Rs. 50,000 do.	2%	1½%
On any sums above Rs. 1,00,000 do.	1%	¾%
On rents recovered	5%	3¾%

### Defunct Companies

Section 247 empowers the Registrar to **strike off his register**, the name of any company which though not legally dissolved is **not carrying on business** or is **not in operation**, or the name of any company which is being wound up but the Registrar has reason to believe that **no liquidator is acting** or, in spite of the affairs of the company being completely wound up, **no returns have been made** by the liquidator as required by the Act for a period of six consecutive months after notice demanding the returns has been sent by post to the company or the liquidator at his last known place of business

The section prescribes the following **procedure**, i.e., when the Registrar has reasonable cause to believe that a company is not in operation, he should send to the company by post a letter inquiring whether it is in operation. If no answer is received within one month, the Registrar must within 14 days after the expiration of the month, send to the company by post a registered letter referring to the first letter and stating that no answer thereto has been received, and that if an answer is not received to the second letter within a month from the date thereof, a notice will be published in the local official Gazette with a view to striking the name of the company off the register. If no answer

is received to this within one month or if an answer is received that the company is not in operation, the Registrar may publish in the local Official Gazette and send to the company by post a notice that on the expiration of 3 months from the date of the notice, the name of the company mentioned therein will, unless cause to the contrary is shown, be struck off the Register and the company dissolved.

In the other cases *i.e.*, where no liquidator is acting, or where no returns are made by the liquidator, the Registrar may publish in the local official Gazette and send to the company a similar notice. Unless cause is shown to the contrary, on the expiration of the time mentioned in the notice, the Registrar may strike its name off the register and shall publish a notice thereof in the local Official Gazette. On such publication the company shall be dissolved but the liability, if any, of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

The Court may order the name of the company to be **restored** to the register on an application of any member or creditor who feels aggrieved by the removal, provided the Court is satisfied that the company was in operation at the time of striking off or that it is otherwise just and proper that it should be restored to the register.

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## CHAPTER XVI. VOLUNTARY AND SUPERVISION WINDING UP

### Voluntary Winding Up

In case of voluntary winding up, the action is, as the term implies, "voluntary." This may be done either when the company for some reason of its own wants to stop or cease carrying on business even though it is quite solvent, or when it finds that by reason of its liabilities, it is unable to continue such business. Under the old Act voluntary winding up used to be resolved upon and conducted entirely and exclusively by the company and the liquidator appointed by it, but under the Indian Companies (Amendment) Act of 1936, voluntary winding up is now divided into two denominations, viz., (1) **members'** voluntary winding up and (2) **creditors'** voluntary winding up. The company may be wound up voluntarily under Sec. 203 as follows —

- (1) Where the **period** (if any) fixed for the duration of the company by the articles expires or the **event** (if any) occurs on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a **resolution** requiring the company to be wound up voluntarily,
- (2) If the company resolves by **special resolution** that the company be wound up voluntarily,
- (3) If the company resolves by **extraordinary resolution** to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up and the expression "resolution for winding up" when used hereafter in this part means resolution passed under clause I, II or III of this section

From this it will be seen that when there is a provision in the articles that by the happening of a particular event, or expiry of a certain period, the company is to be wound up, as

soon as the event occurs or the time provided expires, the directors must call a meeting of the company and place before it the resolution to wind up voluntarily. Here an ordinary resolution is sufficient. The proper notice should be given under the direction of a properly constituted board of directors at which a quorum must be present (*In re Bridport Old Brewery Co.*, 1867, 2 Ch. 191; *Harben v. Philips*, 1883, 23 Ch. D. 14). In drafting the notice as well as the resolution it is best to follow the wording of the Act. The **winding up commences** from the time that the resolution is passed (*Weston's Case*, 1870, 4 Ch. D. 20). It may be noted that it will still be open to any member of the company, who in case of liquidation is known as a contributory, to petition to the Court for compulsory winding up of the company. A provision in the articles, it has been held, does not in any way deprive a member of this statutory right. The usual course, however, is to pass a special resolution for the purpose of winding up voluntarily. An extraordinary resolution is generally passed in case of companies which are unable to carry on business by reason of their liability. It will be thus seen that in the first case an ordinary resolution is wanted whereas in the third, an extraordinary resolution is necessary, and in the second, a special resolution must be passed. Thus in the first and third cases, liquidation commences from the date of the resolution, whereas in the second case, the voluntary liquidation will commence from the time of the passing of the resolution for voluntary winding up (S. 204).

The **effect of voluntary winding up** is that from the commencement of such winding up the company shall cease to carry on business except so far as may be necessary for the beneficial winding up of the company. The corporate state and the corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved (S. 205). It should be however noted that when a voluntary liquidation is followed by a compulsory order, the date of the commencement of the compulsory liquidation is the date of the voluntary liquidation (*In the matter*

of *Indian States Bank Ltd*, 1934, 56 All 692) In voting for the resolution of winding up, the same rules as to voting in the ordinary affairs of the company according to its regulations shall apply both with regard to voting personally as well as by proxy. The **notice** of the resolution, special or extraordinary, to wind up the company voluntarily, should be advertised in the Gazette within ten days of the passing of the same and also in some newspaper circulating in the district where the registered office of the company is situated (Sec 206)

### **The Two Types of Voluntary Winding Up**

As we have seen above under the Indian Companies (Amendment) Act 1936, voluntary winding up is divided into two divisions, (1) **members'** voluntary winding up and (2) **creditors'** voluntary winding up. In this connection it is laid down that where it is proposed to wind up a company voluntarily, the directors of the company, or in a case where there are more than two directors, the majority of directors must at a meeting held before the day on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are to be sent out, make a declaration, verified by an affidavit, to the effect that they have formed an opinion after having made a full enquiry into the affairs of the company that the company will be able to pay its debts in full within a period not exceeding three years from the commencement of the winding up. Thus where this declaration, generally called the "**declaration of solvency**" is made and supported by a report of the company's auditors on the company's affairs and registered with the registrar, the same shall have effect. In cases where such a declaration has been so made and registered the voluntary winding up shall be known as "members' voluntary winding up", whereas, where no such declaration has been made and delivered, the voluntary liquidation will be called "creditors' voluntary winding up" (S. 207). Under a members' voluntary winding up there is a presumption, until the contrary is shown, that all the debts of the company will be paid

in full, and it must be taken that the company is solvent when there is no evidence to the contrary (*Gerard v. Worth of Paris Ltd* [1936] 2 All. E. R. 905).

### **Members' Voluntary Winding up**

In connection with a members' voluntary winding up the **company in general meeting** shall **appoint** one or more **liquidators** for the purpose of winding up the affairs and distributing the assets of the company **and may fix their remuneration**. On the appointment of such a liquidator, all the powers of the directors cease, except so far as the company in general meeting or the liquidator sanctions a continuance thereof (S. 205A).

In case where a **vacancy** occurs by death, resignation or otherwise in the office of the liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill in the vacancy. In order to fill in such a vacancy a general meeting may be convened by any contributory or if there are more than one, by the continuing liquidators. This meeting is to be held in the manner provided by the Companies Act and by the articles or in such manner as may be determined by the Court on application by any contributory or by the continuing liquidators (S. 203B).

In case of a members' voluntary winding up where the whole or part of the company's business or property is proposed to be **transferred or sold to another company** (whether within the meaning of the Indian Companies Act or not) the liquidator of the first named, or the "transferor company" may, with the sanction of a special resolution of the said company, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interest in the second or the transferee company for distribution among the members of the transferor company, or the liquidator may enter into other arrangements whereby the members of the transferor company may, in lieu of receiving cash, shares,

polices or other like interest, participate in the profits of or receive any other benefit from the transferee company (S. 208C (1)). Any sale or arrangement under Sec 208C (1) is binding on the members of the transferor company. Any member of the transferor company who did not vote in favour of the special resolution may express his dissent therefrom in writing addressed to the liquidator, and leave the same at the registered office of the company within seven days after the passing of the resolution, and require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration as provided under the Act (S. 208C. (3)). In case the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved. This purchase money may be raised by the liquidator in such manner as may be determined by special resolution (S. 208C (4)). The special resolution shall not be invalid for the purpose of this Sec 208C by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by order subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court. In this connection provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject matter of the arbitration, shall apply to all arbitrations in pursuance of this section (S. 208C (5) and (6)).

In a case where the members' voluntary winding up **continues for more than one year**, the liquidator must summon a general meeting of the company at the end of the first year from the commencement of the winding up and each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year. He shall lay before this meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars



with respect to the position of the liquidator failing which he shall be liable to a fine not exceeding Rs. 100 (S. 203D).

As soon as the affairs of the company are **fully wound up**, the liquidator shall make up an **account** of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a **general meeting** of the company for the purpose of laying before it the accounts and giving his explanation thereon. This meeting is to be called by advertisement specifying the time, place and object, and must be published one month at least before the meeting in the manner specified in Sec. 206 (1) for publication of a notice within one week. After that meeting the liquidator must send to the registrar a copy of the accounts and must make a **return** to him of the holding of the meeting and of its date. If this copy is not sent or the return is not made, the liquidator shall be liable to a fine not exceeding Rs. 50 for every day during which the default continues. Where a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present at it. In a case where such a return is made, the provisions as to the making of the return shall be deemed to have been complied with. **Three months from the registration of the return the company shall be deemed to be dissolved** unless the Court, on application of the liquidator or any other person who appears to the Court to be interested, makes an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit. In this case the person on whose application the order of the Court was made must, within 21 days after the making of the order, deliver to the registrar a certified copy of the order for registration, failing which the applicant shall be liable to a fine not exceeding Rs. 50 for every day during which the default continues (S. 208E).

It will thus be seen that in case of a members' voluntary winding up, the whole of the conduct of the voluntary liquidation remains in the hands of the members or shareholders.

**Creditors' Voluntary Winding Up**

Where the **directors** are **not able to make a declaration of solvency** as required under Sec. 207 the voluntary winding up shall be conducted under the regulations applying to the voluntary winding up.

Here the company must cause a **meeting of the creditors** to be summoned for the day or the day next following the day on which there is to be held a members' meeting at which the resolution for voluntary winding up is to be passed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the notices of the said meeting of the company. The notice of this meeting must be advertised according to the provisions of Sec. 206 (1) for publication of a notice.

The directors must cause a full statement of the position of the company's affairs, with a list of the creditors of the company and the estimated amount of their claims, to be laid before this meeting of the creditors at which meeting one of their numbers must be appointed by them to preside who must be so present and preside thereat (S. 209A (1), (2), (3) & (4) ).

If the meeting of the company is adjourned and the resolution is passed at some adjourned meeting, any resolution of the creditors passed at this meeting shall have effect as if it had been passed immediately after the passing of the resolution for the winding up of the company. In this case if default is made in complying with the requirements of subsections (1), (2), (3) and (4) it would entail a penalty of a fine not exceeding Rs. 1,000 on the company or directors as the case may be (S. 209A (6) ).

The **creditors** and the **company** at their respective meetings mentioned in Sec. 209A may **nominate** a person to be the **liquidator** for the purpose of winding up their affairs and

distributing the assets of the company. If the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator. If no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator. Where, however, different persons are nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of, or jointly with, the person nominated by the creditors, or appointing some other person to be appointed by the creditors (S. 209B).

Here the creditors may at the meeting so held under Sec. 209A or at any subsequent meeting, if they think fit, appoint a **committee of inspection** consisting of not more than five persons, and after such a committee is appointed the company may, either at a meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number. The creditors may, however, if they think fit, also resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection. In such a case the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee. On any such application to the Court, the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution (S. 209C).

The **committee of inspection**, and where there is no committee, the **creditors**, may **fix a remuneration** to be paid to the **liquidator** or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

On the appointment of a liquidator all the powers of the directors cease, except so far as the committee of inspection, or if there

is no such committee, the creditors, sanction the continuance thereof (S. 209D).

Where there is a **vacancy** through death, resignation or otherwise in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill in the vacancy (S. 209E).

The provisions of Sec. 208C applying to the transfer of the whole or part of the business of the company which is being wound up, to a transferee company, as dealt with above under the members' voluntary winding up, shall also apply in case of a creditors' voluntary winding up, with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction of either the Court or the committee of inspection (S. 209F)

In a case where the creditors' voluntary winding up **continues for more than one year**, the liquidator must summon a general meeting both of the company and of the creditors at the end of the first year from the commencement of the winding up, and each succeeding year or as soon thereafter as may be convenient, and shall lay before the meetings, accounts of his acts and dealings and of the conduct of the winding up during the preceding year, and must present a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up. Failure to comply with these requirements will render him liable to a fine not exceeding Rs. 100 (S. 209G).

As soon as the affairs of the company are **fully wound up** the liquidator must make up an **account** of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of and thereupon shall call a **general meeting** of the company and a **meeting of the creditors** for the purpose of laying the accounts before the meetings and giving an explanation thereof. The meetings shall be called **by advertisement** in the usual way as prescribed

by Sec. 206 (1). Within one week after the date of the said meetings or if the meetings are not held on the same date, after the date of the later meeting, the liquidator must send to the registrar a copy of the account, and make a **return** of the holding of the meetings and their dates. If the copy is not sent or return not made as required, the liquidator is liable to a fine not exceeding Rs. 50 for every day during which the default continues. In case, however, a quorum, which for this purpose shall be two persons, is not present at either of such meetings, the liquidator shall in lieu of such return, make a return that a meeting was duly summoned and that no quorum was present thereat. Upon such a return being made the provisions of this sub-section as to the reporting and the return shall be deemed to have been complied with. On the **expiry of three months** from the registration of this return the company shall be deemed to be **dissolved** unless, as in the case of members' voluntary winding up, the Court otherwise directs on the application of the liquidator or of any other person who appears to the Court to be interested.

### **Voluntary Liquidation Generally**

Apart from the special regulations which apply to the members' voluntary winding up and the creditors' voluntary winding up respectively as stated above, the general regulations as to voluntary winding up as provided for in Secs. 211—218 (both inclusive) of the Amendment Act of 1936, apply to every voluntary winding up, whether the same be a members' or a creditors' voluntary winding up.

### **Consequences of Voluntary Winding Up**

On the voluntary winding up of the company, there shall be the following consequences:—

- (1) The assets of the company are to be realised and applied to the satisfaction of its liabilities *pari passu* and, subject to such applications shall, unless the articles otherwise provide, be distributed among its

members according to their rights and interests in the company (S. 211).

- (2) One or more liquidators shall be appointed.
- (3) The powers of the directors cease on the appointment of the liquidator except so far as in a members' winding up the company or the liquidator, or in a creditors' winding up, the committee of inspection or when there is no committee, the creditors, sanction their continuance.
- (4) The liquidator may, in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the Committee of inspection, exercise any of the powers given by clauses (d) (e) (f) and (h) of Sec. 179 to a liquidator in a winding up. The exercise by the liquidator of the power given by this Act shall be subject to the control of the Court (S. 212 (1) (a) ).
- (5) Without the sanction of the Court or the Committee of inspection the liquidator can exercise any of the other powers given by the Act to the liquidator in a winding up by the Court (S. 212 (1) (b) ).
- (6) The liquidator may exercise the powers of the Court under the Companies Act with regard to the settlement of the list of contributories and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories (S. 212 (1) (c) ).
- (7) The liquidator may exercise the power of the Court of making calls (S. 212 (d) ).
- (8) When more than one liquidator is appointed any powers given by this Act may be exercised by

such one or more of them as may be determined at the time of their appointment. In default of such determination, they may be exercised by any member not less than two.

- (9) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator (S. 213 (1) ).
- (10) The Court may, on cause shown, remove a liquidator and appoint another liquidator (S. 213 (2) ).

### **Appointment of Liquidator**

We have already dealt with the manner in which liquidators in a members' voluntary winding up and a creditors' voluntary winding up respectively, are appointed. This is usually done soon after the passing of the resolution for voluntary winding up, either ordinary or extraordinary, or after the confirmation of the special resolution, as the case may be. As soon as the liquidator is appointed he should give **notice** to the **registrar** of his appointment in the prescribed form **within twenty-one days of his appointment**. Failure to comply with this requirement entails a fine not exceeding Rs. 50 for every day during which the default continues (S. 214).

The Court may, on cause shown, **remove** a liquidator and appoint another liquidator (S. 213 (2) ). In this connection it should be shown that he was unfit, or unsuitable, either personally, or on account of his connection with some parties interested in the liquidation, such as the directors or promoters, whose conduct may be in question in connection with the proceedings (*Sir John Moore Mining Co.*, 1879, 12 Ch.D. 325 ; *Adam Eytton*, 1887, 36 Ch. 299) ; or guilty of misconduct, such as making profits beyond his legitimate remuneration (*Devonshire Silkstone Coal Co.*, 1878, W.M. 71) ; or when his removal is necessary in the interest of the winding up (See *Adam Eytton* quoted above) ; or where the liquidator persists in proceedings against the majority wishes of the creditors

(*Tavistock Iron Works Co.*, 1871, 19 W.R. 672). Insanity or absence from the country are grounds for removal (*North Molton Mining Co.*, 1886, 34 W.R. 527 ; *Scotch Granite Co.*, 1867, 17 L. T. 533). One who is either a creditor or a contributory can make an application for removal of the liquidator (*New De Kaap*, 1908, 1 Ch. 589). The removal is, of course, entirely at the discretion of the Court and the appeal Court will not interfere if satisfied that proper cause was shown; and to be satisfied on that point it will consider evidence (*Re Winston Grange Steamship Co.*, 1900, 17 T.L.R. 553).

### Remuneration of Voluntary Liquidator

The remuneration, according to Sec. 208A has to be fixed at the meeting by the contributories or at a subsequent meeting. If that is not done under Sec. 216 an application can be made to the Court to settle this remuneration as the Court thinks just (*Amalgamated Syndicate Ltd.*, 1901, 2 Ch. 181). In case of a creditors' voluntary liquidation the committee of inspection, or, if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator or liquidators, and when the remuneration is not so fixed it shall be determined by the Court (S. 209D). Generally speaking, the rules of the High Court as to remuneration of liquidators will be a guide, in connection with both compulsory and voluntary liquidation, for the Court to follow.

### Powers of Voluntary Liquidator

The powers of the liquidator in voluntary liquidation are **very wide**, because he acquires all the powers of the official liquidator which in a members' voluntary liquidation he can exercise without the sanction of the Court. He is also given power by the Act to settle the list of contributories and to make calls, also to pay debts and to adjust the rights of contributories. Further he can call a meeting of the company for obtaining sanction for any particular step he wishes to take, either by a special or extraordinary resolution, and in case the



liquidation continues for more than one year, he summons a general meeting of the company at the end of the first year from the date of the commencement of the winding up, and during each succeeding year, if the liquidation lasts for more than one year, before which he must lay a statement in the prescribed form containing the particulars required with regard to the proceedings in the liquidation and the position with regard to them (Ss. 208D and 209G). He has the power to apply to the Court to determine any question arising in the winding up or in order to enforce calls (S. 216). The **object** of the law here, is to leave the company and its liquidators to manage its financial affairs, as far as can be done, independently, and they are expected to come to Court only in extreme cases.

The powers, as specifically given to the voluntary liquidator by the Act, which he can exercise **without the sanction of the Court**, and which the official liquidator in case of compulsory winding up can only exercise with the sanction of the Court are the following :—

- (1) To institute and defend suits.
- (2) To carry on the business of the company so far as may be necessary for the beneficial winding up of the company.
- (3) To sell the moveable and immoveable property of the company by auction or by private contract.
- (4) To execute in the name of the company, deeds, receipts, and other documents and for this purpose to use the company's seal.
- (5) To claim and prove in the insolvency of any contributory for any debt due from the insolvent to the company.
- (6) To draw, accept, make or endorse a bill of exchange, *hundi* or promissory note on behalf of the company.
- (7) To raise on securities on the assets of the company any money required for the purpose of liquidation.

- (8) To take out in his official name letters of administration of any deceased contributory and to do any other act necessary for obtaining payment of money due from the contributory or his estate which cannot be conveniently done in the name of the company.
- (9) To do all such other things as may be necessary for the winding up of the company and distributing the assets.

It may be noted that according to Sec. 212 of the Indian Companies (Amendment) Act of 1936, the powers numbered 4, 5, 6, and 8 can be exercised in the case of a "members' voluntary winding up" with the sanction of the extraordinary resolution of the company and in the case of a "creditors' voluntary winding up" with the sanction of either the Court or the committee of inspection. The rest of the powers may be exercised by the liquidator without such sanction.

According to the powers given in Sec. 208C the voluntary liquidator in a "members' voluntary winding up" can sell the whole or any part of the business or the property of the company, or transfer it with the sanction of a special resolution conferring the general authority or an authority in respect of any particular arrangement, and in return receive by way of compensation or part compensation for such sale or transfer, shares, policies, or other like interest in the transferee company for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interest, or in relation thereto, participate in the profits or receive any profits from the transferee company. This arrangement for sale or transfer under these circumstances would be binding on the members of the transferor company, subject of course to the right of members who dissent to this in writing to get their share or interest purchased at a price to be determined by agreement or by

arbitration in manner provided for in the Companies Act. Where the liquidator elects to purchase the members' interest, the purchase money must be paid before the company is dissolved and may be raised by the liquidator in such manner as may be determined by a special resolution. The same rule applies in case of a "**creditors' voluntary winding up**" with the modification that the powers of the liquidator shall not be exercised except with the **sanction** either of the Court or of the committee of inspection (S. 209F).

In connection with the proving of debts in voluntary liquidation the proof need not be as strict as in case of compulsory liquidation.

In case of statute-barred debts, the voluntary liquidator should not pay them as it is very doubtful whether he can.

### **Making of Calls in Voluntary Liquidation**

In voluntary liquidation, the liquidator is given full powers to settle the list of contributories and to exercise the power of the Court to make calls (S. 212 (1) (d)). The list of the contributories settled by the liquidator in voluntary liquidation is *prima facie* evidence of the liability of these persons. The voluntary liquidator should give notice to each contributory of the appointment to settle the list though it has been held that he is not bound to do so. In preparing the list of contributories he has to make out **two lists**, viz, "A" and "B" lists of contributories. In the "**A**" list he includes all those members of the company at the time of the commencement of the liquidation and who have not paid up the face value of their shares in full. On the "**B**" list he places all those who, though not members at the commencement of the liquidation, may still be likely to be liable in case of failure of their transferees to pay the amount unpaid on shares because one year had not elapsed since the date they transferred their shares or ceased to be members. The liquidator will try to recover in the first instance what he can from the "**A**" list contributories, and members of the "**B**" list shall not be liable to contribute unless the contribution from the A list is insufficient to pay out the debts and

adjust the rights of contributories among themselves. Here also, the contributory on the "**B**" list will be liable to pay only that amount which the person who acquired his shares did not pay, and that too in cases where the debt of the company, in connection with which the contribution was levied, was incurred at or before the time the contributory on the "**B**" list was a member. In a voluntary liquidation when a shareholder dies before the list is settled and his name is included in it and the Court has passed orders for payment of the balance, such balance can be recovered from the legal representative and heir under Sec. 160 by taking proceedings for administration of the estate of the deceased shareholder and not by applying for an order of payment against the legal representative or heir personally (*In re the British India B. & I. Co., Vitaaldas Dhanji & Co. Shiva Chendubariah*, 1934, 36 Bom. L. R. 1002).

With regard to **calls** by the voluntary liquidator, they can only be enforced by an action, or by an application to the Court under Sec. 216. The orders made by the Court in this connection may be enforced in the same manner in which decrees of the Court made in a suit before them may be enforced (S. 199). The above Sec. 216 lays down to the effect that in voluntary liquidation, the liquidator may make an application to the Court for enforcing calls, and the Court after determining the question may accede wholly or partly to the request. Besides making calls for the actual payment of debts due by the company calls may also be made for adjusting the rights of contributories among themselves.

### Duties of the Liquidator

The duty of the liquidator is to pay the creditors and adjust the rights of contributories among themselves from the surplus, if any. The **order** in which this should be done is the following:—

- (1) Pay secured creditors out of the proceeds of their securities.

- (2) Pay cost of liquidation including the liquidator's own remuneration.
- (3) Pay all preferential debts.
- (4) Pay ordinary unsecured creditors.
- (5) Adjust the claims of contributories among themselves from the surplus and pay them out.

While distributing the assets the liquidator should provide for contingent liability after ascertaining it, otherwise it may be a breach of statutory duty. Where in a voluntary liquidation the liquidator distributed the assets of the company without making provision for liability of the company for future rent due under leases of the premises rented by the company, it was held that the liability was one which ought to have been admitted to proof and that the liquidator had committed a statutory breach of duty. He was ordered to pay or provide for the same (*James Smith & Sons (Norwood) Ltd. v. Goodman*, 1936, 1 Ch. D. 216).

### **Winding Up under Supervision of the Court**

When a company has by its special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court thinks just (S. 221). This is done where the creditors or contributories petition to the Court to the effect, and in considering the said petition, the Court has entire discretion as to whether to grant the request or not. As a general rule, where a resolution has been passed for voluntary winding up, an application of a single shareholder will not be considered by the Court for granting either a supervision or a compulsory order. If, however, the general body of shareholders in the meeting in which they passed a voluntary winding up resolution, desire the same to be continued under supervision of the Court, or where the general body of creditors so desire, the Court may, if it thinks proper, pass a supervision order.

The order for supervision pre-supposes that the company is in voluntary liquidation, and thus, the **supervision liquidation commences** from the date of the resolution by which the company was placed in voluntary liquidation. If, however, the resolution to place the company in voluntary liquidation is invalid, the supervision order cannot be made and thus it is necessary at the time the supervision order is applied for that the voluntary winding up resolution preceding it was properly passed.

In deciding between winding up by the Court, and the winding up subject to the Court's supervision, as well as in the appointment of liquidators, and other matters relating to winding up subject to the supervision of the Court, the Court will generally take into consideration the wishes of creditors and contributories and in case of difference, will generally prefer the wishes of creditors, unless their claims are small and properly secured (S. 223).

Winding up under supervision has its own **advantages**. In the first instance it stays automatically all legal proceedings against the company (Ss. 222, 225 and 232). In the second place, the matter comes under the supervision of the Court to the extent laid down by the order of the Court, which may be as vigorous a supervision as in the case of compulsory liquidation or almost as slack as that in voluntary liquidation; and the third point is that the Court may appoint an additional liquidator in supervision liquidation. Generally speaking voluntary winding up precedes the supervision winding up and even where it is decided from the very beginning to ask the Court to supervise the winding up, the resolution itself decides in the first instance that the company should go into voluntary liquidation and that the said voluntary liquidation should continue under the supervision of the Court (*West Cumberland Iron and Steel Co.*, 1889, 40 Ch. D. 361). Under Sec. 226 it is open for a supervision liquidation being followed by a compulsory winding up, and in such cases the compulsory liquidation will be deemed to have commenced from the presentment of the petition for the compulsory order (*Taurine Co.*, 1884, 25 Ch. D. 118).

### **The Petition**

The petition for a supervision order may be made in the same manner as in the case of a compulsory order. It may be made either by the liquidator or the creditor. The liquidator in voluntary winding up will make this petition, if authorised to do so by the shareholders at the time they placed the company into voluntary liquidation. It is also done by the voluntary liquidator under Sec. 216 when the liquidation is threatened with actions, in order to obtain a stay of these actions.

A **contributory's application** for a supervision order will not generally be accepted by the Court where a resolution for voluntary winding up has been passed, unless it can be proved that there has been fraud on the rights of the dissenting minority or that corrupt influences have been used against them. It may also be made if the company appears to be insolvent beyond doubt.

In case where any creditor, or creditors, are prejudiced by the misconduct of the liquidator in voluntary winding up, or where the company is insolvent beyond doubt, the creditors may petition to the Court for a supervision order. The advantage of a supervision order is that all actions are stayed and the whole conduct of the liquidation comes under the supervision of the Court. Here the liquidator is to act according to the directions of the Court and get the benefit of the advice and assistance of the Court which can be obtained by him on application.

In connection with this petition if it is lodged with a view to continue a voluntary winding up subject to the supervision of the Court, it shall for the purpose of giving jurisdiction to the Court over suits be deemed to be a petition for winding up by the Court (S. 222). Here also the Court may, in deciding between winding up by the Court and winding up subject to supervision, in the appointment of liquidators and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence

(S. 223). In this case, the Court can by the same or subsequent order appoint an additional liquidator under Sec. 224, who shall be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company. The Court can also remove any liquidator so appointed by the Court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or resignation. The liquidator appointed by the Court has to give security, though in case of a liquidator appointed by the company, no security is sometimes taken (*Hampshire Land Co.*, 1894, 2 Ch. 632).

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# THE INDIAN COMPANIES ACT, 1913 (VII OF 1913)

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the law relating to Trading Companies and other Associations, It is hereby enacted as follows :—

## PART I.

### PRELIMINARY.

**1. Short title, Commencement & Extent** (1) This Act may be called the Indian Companies Act, 1913.

(2) It shall come into force on the first day of April 1914, and

(3) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

**2. Definitions** (1) In this Act, unless there is anything repugnant in the subject or context,—

- (1) "articles" means the articles of association of a company as originally framed or as altered by a special resolution, including, so far as they apply to the company, the regulations, contained (as the case may be) in Table B in the Schedule annexed to Act No. XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act;
- (2) "company" means a company formed and registered under this Act or an existing company;
- (3) "The Court" means the Court having jurisdiction under this Act;
- (4) "debenture" includes debenture stock;
- (5) "director" includes any person occupying the position of a director by whatever name called;
- (6) "District" Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction.

## INDIAN COMPANIES ACT

- (7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :
- (8) "insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses :
- (9) "manager" means a person who subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not :
- (9A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called :

**Explanation.**—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.

- (10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act.
- (11) "officer" includes any director, managing agent, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor :
- (12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court and, as respects the other provisions of this Act, prescribed by the Central Government.
- (13) "private company" means a company which by its articles—
- restricts the right to transfer its shares, if any; and
  - limits the number of its members to fifty not including persons who are in the employment of the company; and
  - prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member :

- (13A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which is not a private company :

- (14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed
- (15) "The registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies and
- (16) "share" means share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied
- (17) "trading corporation" means a trading corporation within the meaning of Item 33 in List I in the Seventh Schedule to the Government of India Act, 1935

(2) Where the assets of a company consist in whole or in part of shares in another company whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

- (a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent of the issued share capital of that other company or such as to entitle the company to more than fifty per cent of the voting power in that other company, or
- (b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression 'subsidiary company' in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held

**2A Provisions as to companies registered in Burma or Aden before separation from India.** Notwithstanding anything in the last preceding section; a company which was immediately before the separation of Burma and Aden from India a Company as defined by the said section, being a company the registered office whereof is in Burma or Aden,—

- (a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India, and

- (b) shall not, unless the subject matter or context so requires, be included in the expressions 'company', 'existing company', 'public company' and 'private company'

Provided that—(1) for the purposes of Section 277 of this Act such a company shall for a period of six months from the separation, be deemed to be a company incorporated and registered in British India,

(ii) The separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before that date, was void against the liquidator or creditors of such a company.

**3. Jurisdiction of the Courts.** (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate

Provided that the Central Government may, by notification in the Official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding-up

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

## PART II

### CONSTITUTION AND INCORPORATION.

**4. Prohibition of partnerships exceeding certain number.** (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian Law, or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian Law or of Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees

## MEMORANDUM OF ASSOCIATION

**5. Mode of forming incorporated Company.** Any seven or more persons (or where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

- (i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares), or
- (ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee, or
- (iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company)

**6. Memorandum of company limited by shares.** In the case of a company limited by shares—

- (1) the memorandum shall state—
  - (i) the name of the company, with "Limited" as the last word in its name,
  - (ii) the province in which the registered office of the company is to be situate,
  - (iii) the object of the company, and, except in the case of trading corporations, the territories to which they extend,
  - (iv) that the liability of the members is limited,
  - (v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount
- (2) no subscriber of the memorandum shall take less than one share
- (3) each subscriber shall write opposite to his name the number of shares he takes

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**7. Memorandum of company limited by guarantee.** In the case of a company limited by guarantee—

(1) the memorandum shall state—

- (i) the name of the company, with "Limited" as the last word in its name
- (ii) the province in which the office of the company is to be situate
- (iii) the objects of the company, and, except in the case of trading-corporations, the territories to which they extend;
- (iv) that the liability of the members is limited,
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2) if the company has a share capital—

- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount,
- (ii) no subscriber of the memorandum shall take less than one share,
- (iii) each subscriber shall write opposite to his name the number of shares he takes

**8. Memorandum of unlimited company.** In the case of an unlimited company—

(1) the memorandum shall state—

- (i) the name of the company;
- (ii) the province in which the registered office of the company is to be situate,
- (iii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend,
- (iv) that the liability of the members is limited;
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

- (2) if the company has a share capital—
- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount,
- (ii) no subscriber of the memorandum shall take less than one share,
- (iii) each subscriber shall write opposite to his name the number of shares he takes

**8. Memorandum of unlimited company.** In the case of an unlimited company—

- (1) the memorandum shall state
- (i) the province in which the registered office of the company is to be situate
- (ii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend,
- (2) if the company has a share capital—
- (i) no subscriber of the memorandum shall take less than one share
- (ii) each subscriber shall write opposite to his name the number of shares he takes

**9. Printing and signature of memorandum.** The memorandum shall—

- (a) be printed,
- (b) be divided into paragraphs numbered consecutively, and
- (c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature

**10. Restriction on alteration of memorandum** A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act

Provided that any provision in the memorandum relating to the appointment of a manager or a managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition

**11. Name of company and change of name** (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires



(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3) Except with the previous consent in writing of the Central Government, no company shall be registered by a name which—

- (a) contains any of the following words namely, 'Crown,' 'Emperor,' 'Empire,' 'Empress,' 'Federal,' 'Imperial,' 'King,' 'Queen,' 'Royal,' 'State,' 'Reserve Bank,' 'Bank of Bengal,' 'Bank of Madras,' 'Bank of Bombay,' or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; or
- (b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter:

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.

(4) Any company may, by special resolution and subject to the approval of the Central Government signified in writing, change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

**12. Alteration of memorandum.** (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

- (e) to restrict or abandon any of the objects specified in the memorandum or
- (f) to sell or dispose of the whole or any part of the undertaking of the company or
- (g) to amalgamate with any other company or body of persons

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition

(3) Before confirming the alteration the Court must be satisfied—

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of that Court, be affected by the alteration and
- (b) that with respect to every creditor who in the opinion of the Court is entitled to object and who signifies his objection in manner directed by the Court either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined or has been secured to the satisfaction of the Court

Provided that the Court may in the case of any person or class for special reasons dispense with the notice required by this section

**13 Power of Court when confirming alteration** The Court may make an order confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit and may make such order as to costs as it thinks proper

**14. Exercise of Discretion by Court.** the Court shall, in exercising its discretion under section 12 and 13 have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors and may, if it thinks fit adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and may give such direction and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement

Provided that no part of the capital of the company may be expended in any such purchase

**15. Procedure on confirmation of alteration.** (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall within three months from the date of the order, be filed by the company with the registrar, and he shall register the same and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with and thenceforth the memorandum so altered shall be the memorandum of the company

(2) Where the alteration involves a transfer of the registered office from one Province to another a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such

registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office

(1) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper

**16. Effect of failure to register within three months** No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void,

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month

## ARTICLES OF ASSOCIATION.

**17- Registration of articles** (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company

(2) Articles of association may adopt all or any of the regulations contained in Table A in the first Schedule, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 76, 79, 80, 81, and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115, and 116 contained in that Table

Provided that regulations 78, 79, 80, 81 and 82 shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account unless the company in general meeting shall determine otherwise.

(3) In the case of an unlimited company or a company limited by guarantee the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of

members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration

**18 Application of Table A** In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered or, if articles are registered in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles

**19 Form and signature of articles** Articles shall—

- (a) be printed,
- (b) be divided into paragraphs numbered consecutively, and
- (c) be signed by each subscriber of the memorandum (who shall add his address and description) of association in the presence of at least one witness who must attest the signature

**20 Alteration of articles by special resolution** (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No XIX of 1857 and Act No VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum

**20A Effect of alteration in memorandum or articles** Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby

## GENERAL PROVISIONS

**21. Effect of memorandum and articles.** (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same

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extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company

**22. Registration of memorandum and articles.** The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situated, and he shall retain and register them

**23 Effect of registration** (1) On the registration of the memorandum of a company, the registrar shall certify under his hand, that the company is incorporated and in the case of a limited company that the company is limited

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act

**24 Conclusiveness of certificate of incorporation** (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance

**25 Copies of memorandum and articles to be given to members**  
(1) Every company shall send to every member, at his request and within fourteen days thereof on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any)

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees

**25A Alteration of memorandum or articles to be noted in every copy**  
(1) Where an alteration is made in the memorandum or articles of a company, every

copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.

## ASSOCIATIONS NOT FOR PROFIT

**26 Power to dispense with "Limited" in name of charitable and other companies** (1) Where it is proved to the satisfaction of the Central Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, charity or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects and to prohibit the payment of any dividend to its members, the Central Government may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the Central Government under this section may be granted on such conditions and subject to such regulations as the Central Government thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the Central Government so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations except those of using the word "Limited" as any part of its name and of publishing its name, and of sending lists of members to the registrar.

(4) A license under this section may at any time be revoked by the Central Government, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section.

Provided that, before a license is so revoked, the Central Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

## COMPANIES LIMITED BY GUARANTEE

**27. Provisions as to companies limited by guarantee.** (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or

in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

### PART III.

#### SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

##### DISTRIBUTION OF SHARE CAPITAL

**28. Nature of shares.** (1) The shares or other interests of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

**29. Certificate of shares or stock.** A certificate, under the common seal of the company, specifying any shares or stock held by any member shall be prima facie evidence of the title of the member to the shares or stock therein specified.

**30. Definition of "member".** (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as member in its register of members.

(2) Every other person who agreed to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

**31. Register of members.** (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

- (i) the names and addresses, and the occupations, of any members and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each members;
- (ii) the date at which each person was entered in the register as a member;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

**31A Index of members of company.** (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees

**32 Annual list of members and summary.** (1) Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company

(2) The list shall state the names, addresses and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) the amount of the share capital of the company, and the number of the shares into which it is divided,
- (b) the number of shares taken from the commencement of the company up to the date of the return;
- (c) the amount called up on each share,
- (d) the total amount of calls received,
- (e) the total amount of calls unpaid,



- (f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any shares or debentures, since the date of the last return or so much thereof as has not been written off at the date of the return,
- (g) the total number of shares forfeited;
- (h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return,
- (i) the total amount of share-warrants issued and surrendered respectively since the date of the last return,
- (k) the number of shares or amount of stock comprised in each share-warrant,
- (l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers or managing agents of the company, and the changes in the personnel of the directors, managers, and managing agents since the last return together with the dates on which they took place, and
- (m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within twenty one days after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager, or secretary that the list and summary state the facts as they stood on the day aforesaid.

(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty.

(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during

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in the default commences, and every officer of the company who knowingly and willfully authorizes or permits the default shall be held to the like penalty.

**33 Trusts not to be entered on register.** No notice of any trust created by or in relation to any land shall be entered on the register, or be receivable by the registrar, unless the trust is a trust of land within the meaning of the Law of Property Act, 1925 (s. 1(1)).

**34. Transfer of shares** (1) An application for the re-issuance of the certificate of shares in a company may be made either by the transferee or the transferor, provided that where such application is made by the transferor no certification shall be made in the said partly paid-up certificate and the company give notice to the applicant with the certificate of the provisions of subsection (7). If a company has made objection as made by the transferee within two weeks of the date of application and a request of amendment the number of shares to be re-issued is the same as the number of shares in the certificate of shares, the same condition is that the application is a continuous one and the transferee is not a minor.

(a) To check for odd sub-sequences to the number will be deemed to have been given and provided  $p \neq p + 1$  not the true form of the idea. With the same or other and will be deemed to have been given by the above or of part

(c) The following shall apply to any company who enters into a contract of hire in  
 relation to the company and its property and its other interests and its  
 and executed by the other and shall be the same as the company to the  
 company does not the

Provided that, when it is proved that it faces no real objection of the company that non-instrumentation is a valid transfer and transference in her to the community may if it can then think it on an application in such made by the transfer and be from the company required by an instrument from a user the true for a new terms a to indirectly a the data is any lack of

(1) If a company, pursuant to the transfer of any shares or debentures, the company shall within two months from the date on which the instrument of transfer was lodged with the company send to the transferee and the transferee or one of the transferees

(c) If a default made in compliance with the demand of this section the company and every director, manager, secretary or other officer of the company who knowingly party to the default shall be liable to pay not exceeding fifty rupees for every day during which the default continue.

(6) Nothing in subsection (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transferred by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.

**35 Transfer by legal representative** A transfer of the share or other interest of a deceased member of a company made by his legal representative shall although the legal representative is not himself a member be as valid as if he had been a member at the time of the execution of the instrument of transfer.

**36. Inspection of register of members.** (1) The register of members, commencing from the date of the constitution of the company and the index of members shall be kept at the registered office of the company and except when closed under the provisions of this Act shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis and to the inspection of any other person on payment of one rupee or such less sum as the company may prescribe for each inspection. Any such member or other person may make extracts therefrom.

(2) Any member or other person may require a copy of the register or of any part thereof or of the list and summary required by this Act, or any part thereof in print or in type or in any other form, and the company shall cause any copy so required by any person to be sent to that person within a period of ten days exclusive of non-working days and days on which the firm or books of the company are closed, commencing on the day next after the day on which the requirement is received by the company.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by order compel an immediate inspection of the register and index or direct that copies required shall be sent to the person requiring them.

**37 Power to close register** A company may on giving seven days previous notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate close the register of members for any time or times not exceeding in the whole forty-five days in each year but not exceeding thirty days at a time.

**38 Power of Court to rectify register** (1) If

- (i) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company or
- (ii) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member

the person aggrieved or any member of the company or the company may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved and may make such order as to costs as it in its discretion thinks fit,

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register where the question arises between members or alleged members or ex-members of a company and members on the one hand and the company or its other body and members may decide any question arising except that referred to rectification of the register.

It is declared that the Court may on an application in which any question is raised as aforesaid and on application by a person on such an issue shall have in its jurisdiction conferred by the Code of Civil Procedure, 1908 on the grounds mentioned in section 10 of that Code.

**39. Notice to registrar of rectification of register.** In the case of a person proposing to apply to the Court for rectification of the register, the Court may, if it thinks fit, direct the registrar to be notified of the application and to be ordered to produce to the Court the register as it is at the time when the application is made.

**40. Register to be evidence.** The register as it is at the time when the application is made shall be *prima facie* evidence of its contents and shall be admissible in evidence to be inserted

## **41. Power for company to keep branch register in the United Kingdom**

A company may, if authorised by its articles, cause to be kept in the United Kingdom a branch register in addition to the register kept in India.

(1) The company shall cause to be kept in the office of the company or in the office of a person authorised by the company in that behalf, a branch register in which shall be entered the names of all persons who are entitled to shares in the company and the names of all persons who are entitled to shares in the company and the names of all persons who are entitled to shares in the company.

(2) The company may cause to be kept in the office of the company or in the office of a person authorised by the company in that behalf, a branch register in which shall be entered the names of all persons who are entitled to shares in the company and the names of all persons who are entitled to shares in the company.

**42. Regulation as to British register.** A British register shall be deemed to be kept in the United Kingdom if it is kept in the United Kingdom or in any place to which the company is entitled to send its documents.

(2) It shall be kept in the United Kingdom if it is kept in the United Kingdom or in any place to which the company is entitled to send its documents. It shall be kept in the United Kingdom if it is kept in the United Kingdom or in any place to which the company is entitled to send its documents.

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(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

**42A.** (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom.

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register.

**43. Issue of share warrants to bearer.** (1) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

(2) Nothing in this section shall apply to a private company.

**44. Effect of share warrant.** A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

**45. Registration of name of bearer of share-warrant.** The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

**46. Position of bearer of share-warrant.** The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the

shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles

**47. Entries in register when share-warrant issued** (1) On the issue of a share warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member and shall enter in the register the following particulars, namely —

- (i) the fact of the issue of the warrant,
- (ii) a statement of the shares or stock included in the warrant distinguishing each share by its number and
- (iii) the date of the issue of the warrant

(2) If a company makes default in complying with the requirements of this section it shall be liable to a penalty not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully continues the default shall be liable to the like penalty

**48. Surrender of share-warrant** Until the warrant is surrendered the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members and on the surrender the date of the surrender shall be entered as if it were the date at which a person ceased to be a member

**49. Power of company to arrange for different amounts being paid on shares.** A company if so authorized by its articles may do any one or more of the following things, namely —

- (1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payments of calls on their shares
- (2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any share held by him although no part of that amount has been called up
- (3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others

**50. Power of company limited by shares to alter its share capital.**

(1) A company limited by shares if so authorized by its articles, may alter the conditions of its memorandum as follows (that is to say) it may—

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient,
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares,

- (v) convert all or any of its paid up share into stock and to convert that stock into paid up share of any denomination;
- (vi) to divide its shares or any of them into shares of any value in than is fixed by the memorandum, so however that in the subdivision the proportion taken be an unit part of the amount of any unpaid or other liability not in the nature of a loan be cancelled in full in whole or in part, and the amount of the shares so cancelled
- (vii) to do here with all the duties in relation thereto which shall have not been taken or agreed to be taken by any person, and during the period of time until the amount of the shares so cancelled

(2) The power of resolution conferred on the directors of the company in general meetings.

(3) A cancellation of shares in pursuance of the resolution shall not be deemed a reduction of share capital within the meaning of the Act.

(4) The company shall file with the registrar a copy of the resolution referred to in clause (3) within fifteen days after the execution thereof.

**51 Notice to registrar of consolidation of share capital conversion of shares into stock etc.** (1) Where a company having a share capital has consolidated and divided its share of its share capital into shares of any value or convert any of its shares into stock or convert a stock into shares, it shall file with the registrar of the same particulars of the consolidation and division conversion or conversion and not convert the register of the same particulars of the consolidation or conversion or the stock so converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

**52 Effect of conversion of shares into stock.** Where a company having a share capital has converted any of its shares into stock and filed notice of the conversion with the registrar of the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock and the register of members of the company and the list of members to be filed with the registrar shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinafter required by this Act.

**53 Notice of increase of share capital or of members.** (1) Where a company having a share capital, whether its share have or have not been converted

into stock has increased its share capital beyond the registered capital and where a company not having a share capital has increased the number of its members beyond the registered number it shall file with the registrar, in the case of an increase of share capital within fifteen days after the passing of the resolution authorising the increase and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase,

(2) The notice to be given as aforesaid shall include particulars of the class of shares affected and the conditions (if any) subject to which the new shares are to be issued.

(3) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and unlawfully authorises or permits the default shall be liable to the like penalty.

## 54. Omitted by the Indian Companies (Amendment) Act, 1942.

### REDUCTION OF SHARE CAPITAL

**54A. Restrictions on purchase by company or loans by company for its own shares.** (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company, unless the consequent reduction of capital is sanctioned in the manner provided by section 55 to 66.

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

Provided that nothing in this section shall be taken to prohibit where the lending of money is part of the ordinary business of a company the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly in default shall be liable to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 101B.

**55. Reduction of share capital.** (1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may



- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or
- (ii) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by available assets or
- (iii) either with or without extinguishing or reducing liability on any of its shares pay off any paid up share capital which is in excess of the wants of any company, and may if and so far as necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly

(4) A special resolution under this section is in this Act called a resolution for reducing share capital

**56 Application to Court for confirming order** When a company has passed a resolution for reducing share capital it may apply by petition to the Court for an order confirming the reduction

**57. Addition to name of company of 'and reduced.'** On and from the passing by a company of a resolution for reducing share capital or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital, then on and from the making of the order confirming the reduction the company shall add to its name until such date as the Court may fix the words 'and reduced' as the last words in its name and those words shall until that date be deemed to be part of the name of the company

Provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital the Court may if it thinks expedient dispense altogether with the addition of the words 'and reduced'

**58 Objections by creditors, and settlement of list of objecting creditors**

(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital and in any other case if the Court so directs every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction

(2) The Court shall settle a list of creditors so entitled to object and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction

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**59 Power to dispense with consent of creditor on security for his debt.** Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, or the company secure payment of his debt or claim by appropriating as the Court may direct, the following amount (that is to say)

- (i) if the company admits the full amount of his debt or claim, or, though not admitting it is willing to provide for it, then the full amount of the debt or claim
- (ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court

**60 Order confirming reduction.** The Court if satisfied with respect to every creditor of the company who under this Act is entitled to object to the reduction that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been secured may make an order confirming the reduction on such terms and conditions as it thinks fit

**61. Registration of order and minute of reduction** (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share and the amount (if any) at the date of the registration deemed to be paid on each share shall register the order and minute

(2) On the registration and not before the registration for reducing share capital as confirmed by the order or reduced shall take effect

(3) Notice of the registration shall be published in such manner as the Court may direct

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with and that the share capital for the company is such as is stated in the minute

**62. Minute to form part of memorandum** (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

**63. Liability of members in respect of reduced shares.** (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings, for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

- (i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and
- (ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute and make and enforce calls and order on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

**64. Penalty on concealment of name of creditor.** If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

**65. Publication of reasons for reduction.** In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and if the Court thinks fit, the causes which led to the reduction.

**66. Increase and reduction of share capital in case of a company limited by guarantee having a share capital.** A company limited by guarantee

and registered after the commencement of this Act may, if it has a share capital and so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

## VARIATION OF SHAREHOLDERS' RIGHTS.

**Rights of holders of special classes of shares.** (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly.

## REGISTRATION OF UNLIMITED COMPANY AS LIMITED

**57. Registration of unlimited company as limited.** (1) Subject to the provisions of this section, any company registered as unlimited may register under

this Act as limited, or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

**68. Power of unlimited company to provide for reserve share capital on re-registration.** An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely —

- (a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;
- (b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up

### RESERVE LIABILITY OF LIMITED COMPANY

**69. Reserve liability of limited company.** A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

### UNLIMITED LIABILITY OF DIRECTORS

**70. Limited company may have directors with unlimited liability.** (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the director of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a state-

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ment that the liability of the person holding that office will be unlimited, and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(8) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person so elected or appointed shall not be affected by the default.

**71. Special resolution of limited company making liability of directors unlimited.** (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum.

## PART IV

### MANAGEMENT AND ADMINISTRATION

#### Office and Name

**72. Registered office of company.** (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.

**73. Publication of name by a limited company.** Every limited company—

- (a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in

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a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place,

- (b) shall have its name engraven in legible characters on its seal,
- (c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisement and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company

**74. Penalties for non-publication of name** (1) If a limited company does not print or affix and keep printed or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so printing or affixing its name and for every day during which its name is not so kept printed or affixed and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque, or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof unless the same is duly paid by the company

**75. Publication of authorised as well as subscribed and paid-up capital** (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

## MEETING AND PROCEEDINGS.

**76. Annual general meeting.** (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and there after once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

**77. Statutory meeting of Company.** (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

- (a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;
- (b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;
- (c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payment made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares;
- (d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any and secretary of the



company and the changes, if any, which have occurred since the date of the incorporation ;

- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification ;
- (f) the extent to which underwriting contracts, if any, have been carried out ;
- (g) the arrears, if any, due on calls from directors, managing agent and managers ; and
- (h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or partner of the managing agent if the managing agent is a firm or if the managing agent is a private company, a director thereof.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The directors shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company.

**78. Calling of extraordinary general meeting on requisition.** (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the object of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

(4) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

**79. Provisions as to meetings and votes.** (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf :—

- (a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit;
- (b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every

member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression 'Table A' means that table as for the time being in force; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any

- (c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll: Provided that in the case of a private company if not more than seven members are personally present two members shall be entitled to demand a poll;
  - (d) an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles, and
  - (e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.
- (2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf :—
- (a) two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent. in number of the members of the company may call a meeting;
  - (b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum;
  - (c) any member elected by the members present at a meeting may be chairman thereof;
  - (d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote;
  - (e) on a poll votes may be given either personally or by proxy;
  - (f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation, either under seal or under the hand of an officer or an attorney duly authorised; and

(g) a proxy must be a member of the company.

(8) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.

**80. Representation of companies at meetings of other companies of which they are members.** A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual share-holder of that other company,

**81. Extraordinary and special resolutions.** (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given.

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed, a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed, a poll may be demanded.

(5) In a case where, if a poll is demanded, it may be in accordance with the articles be taken in such manner as the chairman may direct; it may, if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company, or under this Act.

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, or under this Act.

### **82. Registration and copies of special and extraordinary resolutions.**

(1) A copy of every special and extraordinary resolution shall, within fifteen days from the passing thereof be printed or typewritten and duly certified under the signature of an officer of the company and filed with the registrar who shall record the same.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section, a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

### **83. Minutes of proceedings of general meetings and of its directors.**

(1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had and all appointments of directors or liquidators shall be deemed to be valid.

(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(5) Any member shall at any time after seven days from the meetings be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.

(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine not exceeding twenty-five rupees for every day during which the default continues.

(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.

## DIRECTORS

**83A. Directors obligatory.** (1) Every company shall have at least three directors.

(2) This section shall not apply to a private company except a private company being a subsidiary company of a public company,

**83B. Appointment of directors** (1) In default of and subject to any regulations in the articles of a company other than a private company—

- (i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed,
- (ii) the directors of the company shall be appointed by the members in general meeting; and
- (iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed a director

(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors

shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation :

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section.

#### 84. Restrictions on appointment or advertisement of director.

(1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

- (i) signed and filed with the registrar a consent in writing to act as such director; and
- (ii) save in the case of companies not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) or taken from the company and paid or agreed to pay for his qualification shares or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name.

(2) On the application for registration of the memorandum and articles, if any, of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

85. Qualification of director. Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

(3) If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

**36. Validity of acts of directors.** The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

**36A. Ineligibility of bankrupt to act as director.** (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both.

(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India.

**36B. Assignment of office by directors.** If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company :

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section :

Provided always that any such alternate or substitute director shall ipso facto vacate office if and when the appointor return to the district in which meetings of the directors are ordinarily held.

**Explanation**—For the purposes of the proviso to this section, the presidency towns of Calcutta and Madras shall be deemed to be part of the 24-Parganas and Chingleput Districts, respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.

**36C. Avoidance of provisions relieving liability of directors.** Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any



liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void :

Provided that—

- (a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1930, this section shall have effect only on the expiration of a period of six months from that date, and
- (b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and
- (c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court.

**26D. Loans of directors.** (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner or to a private company of which such director is a member or director.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company.

**26E. Director not to hold office of profit.** No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting held any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker,

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1930, in respect of any office of profit under the company held by him at the commencement of the said Act.

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**Explanation.**— For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company.

**36F. Sanction of directors necessary for certain contracts.** Except with the consent of the directors, a director of the company, or the firm of which he is a partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.

**36G. Removal of directors.** (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.

**36H. Restrictions on powers of directors.** The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting,—

- (a) sell or dispose of the undertaking of the company;
- (b) remit any debt due by a director.

**36I. Vacation of office of director.** The office of a director shall be vacated if—

- (a) he fails to obtain within the time specified in sub-section (1) of section 85, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or
- (b) he is found to be of unsound mind by a Court of competent jurisdiction, or
- (c) he is adjudged an insolvent, or
- (d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or
- (e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the com-

pany other than that of a managing director or a legal or technical adviser or a banker, or

- (f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or
- (g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of section 86D, or
- (h) he acts in contravention of section 86—F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section.

**87. Register of directors, managers and managing agents.** (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say:—

- (a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;
- (b) in the case of a corporation, its corporate name and registered or principal office; and the full name, address and nationality of each of its directors; and
- (c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner,

(2) The company shall within the periods respectively mentioned in this section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall be during business hours (subject to such reasonable restrictions as the company may by its articles or in

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general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register.

### MANAGING AGENTS

**87A. Duration of appointment of managing agent.** (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed to hold office for a term of more than twenty years at a time.

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years.

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any.

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid.

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.

**87B. Conditions applicable to managing agents.** Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company :

- (a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is con-

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victed of an offence in relation to the affairs of the company, punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company :

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal;

- (b) the office of a managing agent shall be vacated if he is adjudged insolvent;
- (c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting:

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment.

- (d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company ;
- (e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company: Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management; and
- (f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract or management made after the commencement of the Indian

**Companies (Amendment) Act, 1936,** shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86E:

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth,

**37C. Remuneration of managing agent.** (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management.

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and out-goings, depreciation, bounties or subsidies received from any Government or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund:

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance.

**37D. Loans to managing agents.** (1) No company shall make to a managing agent of the company or to any partner of the firm if the managing agent is a firm, or to any member or director of the private company if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall

be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall, be liable jointly and severally for the amount unpaid.

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing therein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.

**37E. Loans to or by companies under the same management.** (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act, except by way of renewal of an existing loan or guarantee given, make any loan to or guarantee any loan made to any such company:

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.

**37F. Purchase by company of shares of company under same managing agent.** A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.

**37G. Restriction on managing agent's powers of management.** A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the

directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void.

**37H. Managing agent not to engage in business competing with the business of managed company.** A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.

**37I. Limit on number of directors appointed by managing agent.** Notwithstanding anything contained in the articles of a company other than a private company, the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors.

## CONTRACTS

**38. Form of contracts.** (1) Contracts on behalf of a company may be made as follows (that is to say) :—

- (i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;
- (ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(3) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives as the case may be.

**39. Bills of exchange and promissory notes.** A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.

**39. Execution of deeds.** A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney to execute deeds on its behalf in any place either in or outside British India; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.



**91. Power for company to have official seal for use abroad.** (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A Company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then, until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

**91A. Disclosure of interest by director.** (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interests or the making of the contract or arrangement:

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provision of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.

**21B. Prohibition of voting by interested director.** (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote, his vote shall not be counted :

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company :

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.

**21C. Disclosure to members in case of contract appointing a manager.**

(1) Where a company enters into a contract for the appointment of a manager or managing agent of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, within twenty-one days from the date of entering the contract or the varying of the contract, send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(3) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

**21D. Contracts by agents of company in which company is undisclosed principal.** (1) Every manager or other agent of a company other than a private company not being the subsidiary company of a public company who entered into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company and send copies to the directors, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

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- (a) the contract shall, at the option of the company, be void as against the company, and
- (b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.

## PROSPECTUS

**92. Filing of Prospectus.** (1) Every prospectus issued by or no behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

**93. Specific requirements as to particulars of prospectus.** (1) Every prospectus issued by or behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

- (a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemed preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption; and
- (b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions and addresses of the directors or proposed directors and of the manager or proposed managers and managing

agents or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and

- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and
- (ee) where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations; and
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and
- (ff) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser as each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus; and
- (g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

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- (h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and
- (i) the amount or estimated amount of preliminary expenses; and
- (k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (l) the dates of, and parties to, every material contract, including contracts relating to the acquisition of property to which clause (f) applies, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus; and
- (m) the names and addresses of the auditors (if any) of the company; and
- (n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion of the company; and
- (o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by and the right in respect of capital and dividends attached to the several classes of shares respectively; and
- (p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions; and

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(9) where any part of the sums required for the matters set out in subsection (3) of section 101 is to be provided out of the sources other than share capital, particulars of the amount to be so provided and the sources thereof.

(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely :—

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact ;

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus :

Provided that if, in the case of a company which has been carrying on business for less than three years; the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.

(1B) The statement referred to in clause (ii) of sub-section (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to

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specify the contents of the memorandum, or the signatures thereto and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interests of directors the names, description and addresses of directors or proposed directors, and of managers or proposed managers and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business :

Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of section 154.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

**94. Meaning of "vendor" in section 93.** For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case, where—

- (a) the purchase-money is not fully paid at the date of issue of the prospectus; or
- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (c) the contract depends for its validity or fulfilment on the result of that issue.

**95. Application of section 93 to the case of property :**

Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression, "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

**96. Invalidity of certain conditions as to waiver of notice.** (1) Any conditions requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93 :

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

- (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or
- (b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provision of this sub-section, he shall be liable to a fine not exceeding five hundred rupees.

**97. Saving in certain cases of non-compliance with section 93.** (1) If a prospectus is issued which does not comply with the provision of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed:

(2) In the event of non-compliance with or contravention of any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if he proves that—

- (a) as regards any matter not disclosed, he was not cognisant thereof; or
- (b) the non-compliance or contravention arose from an honest mistake of fact on his part; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused :

Provided that, in the event of non-compliance with or contravention of the requirements contained in clause (a) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed.

**98. Obligations of companies where no prospectus is issued.** (1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a



proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the form marked I in the Second Schedule.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act, or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

**98A. Document offering shares or debentures for sale to be deemed a prospectus.** (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omission from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment or of an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or
- (b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 98 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and
- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(d) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.

**99. Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.** A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

**100. Liability for statements in prospectus.** (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true;

(b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation: Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document:

or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that, after the issue of the prospectus and before allotment thereunder, he on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(3) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

- (a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;
- (b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

## ALLOTMENT

**107. Restriction as to allotment.** (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (3) has been subscribed, and the sum of at least five per cent thereof has been paid to or received in cash by the company.

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely:—

- (a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
- (b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company;
- (c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters; and
- (d) working capital.

(3A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.

(3B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.

(3C) In the event of any contravention of the provision of sub-section (3B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.

(3E) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and eighty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and eighty days after the issue of the prospectus, the directors of the company shall be jointly

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and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and ninetieth day. Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (8) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

- (a) the amount if any fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or
- (b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash;

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

**102. Effect of irregular allotment.** (1) An allotment made by a company to an applicant in contravention of the provisions of section 98 or section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 98 or section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damage or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

**103. Restrictions on commencement of business.** (1) A company shall not commence any business or exercise any borrowing powers unless—

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and
- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and
- (c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with; and
- (d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled :

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing power in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act, which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

**104. Return as to allotments.** (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,--

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- (a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(5) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract, stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899 and the registrar may as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 81 of that Act.

(2A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-section (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit and, if he does so, the provisions of sub-section (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the registrar were substituted.

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the registrar within the time specified in sub-section (1) and (2) any document required to be filed by this section the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles was forfeited for non-payment of calls.

## COMMISSIONS AND DISCOUNTS.

**105. Power to pay certain commissions and prohibitions of all other commissions, discounts, etc.** (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

- (a) in the case of shares offered to the public for subscription, disclosed in the prospectus; or
- (b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares, is issued, also disclosed in that circular or notice.

(2) Save as aforesaid and save as provided in section 105A no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

**105A. Power to issue shares at a discount.** (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued :

Provided that—

- (a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court;



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- (b) the resolution must specify the maximum rate of discount (not exceeding ten per cent, in any case) at which shares are to be issued;
- (c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business;
- (d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with sub-section (2), the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees.

**105B. Issue of redeemable preference shares.** (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed :

Provided that—

- (a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company ;
- (b) no such shares shall be redeemed unless they are fully paid;
- (c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund to be called "the capital redemption reserve fund", a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company;
- (d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the shares capital of the company shall not for the purpose of calculating the fees payable under section 249 be deemed to be increased by the issue of shares in pursuance of this sub-section :

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

**105C. Further issue of capital.** Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered the directors may dispose of the same in such manner as they think most beneficial to the company.

**106. Statement in balance-sheet as to commissions and discounts.** Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

## Payment of Interest out of Capital

**107. Power of company to pay interest out of capital in certain cases.** Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or building or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that--

- (1) no such payment shall be made unless the same is authorised by the articles or by special resolution,
- (2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Central Government, which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section,
- (3) before sanctioning any such payment, the Central Government may at the expense of the company, appoint a person to inquire and report to the Central Government as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;
- (4) the payment shall be made only for such period as may be determined by the Central Government; and such period shall in no case extend beyond the close of the half year next after the half-year during which the works or building have been actually completed or the plant provided;
- (5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Central Government may, by notification in the Official Gazette, prescribe;
- (6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid;
- (7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate;
- (8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

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## CERTIFICATES OF SHARES, ETC.

**108. Limitation of time for issue of certificates.** (1) Every company shall within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debentures stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

## INFORMATION AS TO MORTGAGES, CHARGES, Etc.

**109. "Certain Mortgages and charges to be void if not registered.**

(1) Every mortgage or charge created after the commencement of this Act by a company and being either—

- (a) a mortgage or charge for the purposes of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or
- (d) a mortgage or charge on any book debts of the company; or
- (e) a mortgage or charge, not being a pledge on any moveable property of the company except stock-in-trade; or

(f) a floating charge on the undertaking or property of the company; shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

**Provided—**

- (g) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one

days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument of copy are to be filed with the registrar; and

- (ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and
- (iii) where a negotiable instrument has been given to secure the payment of any book debts of a company the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and
- (iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

In this section 'British India' does not include Burma or Aden, whatever the date of the mortgage or charge in question.

**105A. Registration of charges on properties acquired subject to charge.** (1) Where after the commencement of the Indian Companies (Amendment) Act, 1986, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the

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acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.

**110. Particulars in case of series of debentures entitling holders *pari passu*.** Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series the following particulars :—

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolution authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees (if any) for the debenture-holders;

together with the deed or copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register :

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

**111. Particulars in case of commission, etc., on debentures.** Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditions, for any such debentures, the particulars, required to be filed for registration under section 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

**112. Register of mortgages and charges.** (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages

and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(5) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

**113. Index to register of mortgages & charges.** The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars of the mortgages or charges registered with him under this Act.

**114. Certificate of registration.** The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of section 109 to 112 as to registration have been complied with.

**115. Endorsement of certificate of registration on debenture or certificate of debenture stock.** The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

**116. Duty of company & right of interested party as regards registration.** (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fee properly paid by him to the registrar on the registration.

(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid.

**117. Copy of instrument creating mortgage or charge to be kept at registered office.** Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company. Provided that, in the case of a company having debentures, a copy of one such debenture shall be sufficient.

**118. Registration of appointment of receiver.** (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

**119. Filing of accounts of receivers** (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver, file with the registrar notice to that effect, and the registrar, shall enter the notice in the register of mortgages and charges.

(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

(3) If default is made in complying with the requirements of this section, the company, and every director, manager, managing agent, secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.

**120. Rectification of register of mortgages.** (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage, or charge, or the omission to give intimation to the registrar



of the payment or satisfaction of a debt for which a charge or mortgage was created, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or, share-holders of the company, or that on other ground it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

(3) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.

**121. Registration of satisfaction of mortgages & charges.** (1) It shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagee calling upon him to show cause, within a time, (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the registrar and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

**122. Penalties** (1) If any company makes default in filing with the registrar for registration the particulars—

- (a) of any mortgage or charge created by the company; or
- (b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109A; or
- (c) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

**123. Company's register of mortgages.** (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

**124. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.** (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

**125. Right to inspect the register of debenture-holders and to have copies of trust-deed.** (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such

debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

## DEBENTURES AND FLOATING CHARGES.

**126. Perpetual debentures.** A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

### **127. Power to re-issue redeemed debentures in certain cases.**

(1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company, so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power, the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue, the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue, they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section,

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been re-deemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section, which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

- (a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed; or
- (b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

## 128. Specific performance of contract to subscribe for

A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

## of certain debts out of

in priority to claims under the charge. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any sums coming to the hands of the receiver or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

### STATEMENTS, BOOKS AND ACCOUNTS

**130. Books to be kept by company and penalty for not keeping proper books.**

(1) Every company shall cause to be kept proper books of account with respect to—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
- (b) all sales and purchases of goods by the company;
- (c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2).

(4) In the case of a company managed by a managing agent the managing agent, or where the managing agents is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission begun the estate of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.

**131. Annual balance-sheet.** (1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months:

Provided that the registrar may for any special reason extend the period by a period not exceeding three months.

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the Company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditors' report to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before that meeting.

**131A. Directors' Report.** (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.

(3) The provisions of sub-section (3) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section.

**132. Contents of balance-sheet.** (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company in accordance with the requirements indicated by the items contained in the form marked F in the Third Schedule giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any

director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto.

**132A. Balance-sheet to include particulars as to subsidiary companies.** (1) Where a company, in this Act, referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance-sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 138, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent—

- (a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and
- (b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts:

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner:

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent. or more of the share of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company

made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 180 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 188 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

**133. Authentication of balance-sheet.** (1) Save as provided by sub-section (2) the balance-sheet and profit and loss account or income and expenditure account shall—

- (i) in the case of a banking company, be signed by the manager or managing agent (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors,
- (ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager or managing agent (if any) of the company

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance sheet and profit and loss account or income and expenditure account shall be signed by all the directors for the time being in British India, or, if there is only one director, for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet and profit and loss account or income and expenditure account a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any default is made in laying before the company or in issuing a balance sheet and profit and loss account or income and expenditure account as required by section 181 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 181, section 182,



section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.

**134. Copies of balance-sheet to be forwarded to the registrar.**

(1) After the balance-sheet and profit and loss account or the income and expenditure account, as the case may be, have been laid before the company at the general meeting, three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 82.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

**135. Right of member of company to copies of the balance-sheet and the auditor's report.** Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the profit and loss account or the income and expenditure account and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

**STATEMENT TO BE PUBLISHED BY BANKING  
AND CERTAIN OTHER COMPANIES**

**136. Certain companies to publish statement in schedule.** (1) Every company being a limited banking or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement together with a copy of the last audited balance-sheet laid before the members of the company shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

## INVESTIGATION BY THE REGISTRAR.

### 137. Power of Registrar to call for information or explanation.

(1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

(2) on the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit.

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Central Government.

(6) If it is represented to the registrar in materials placed before him by any contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may, after giving the company an opportunity of being heard, by

written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-section (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of the section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.

### INSPECTION AND AUDIT

**138. Investigation of affairs of company by inspectors.** The Central Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct—

- (i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;
- (ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;
- (iii) in the case of a company not having a share capital, on the application, of not less than one-fifty in number of the persons on the company's register of members;
- (iv) in the case of any company, on a report by the registrar under section 137, sub-section (5).

**139. Application for inspection to be supported by evidence.** An application by members of a company under section 138 shall be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the Central Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

**140. Inspection of books and examination of officers** (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the

affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

**141. Results of examination how dealt with.** (1) On the conclusion of the investigation, the inspectors shall report their opinion to the Central Government and a copy of the report shall be forwarded by the Central Government to the registrar and another copy to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(2) The report shall be written or printed, as the Central Government directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Central Government directs the same to be paid by the company, which the Central Government is hereby authorised to do.

Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land revenue.

(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody.

**141A. Institution of prosecutions.** (1) If from any report made under section 138 it appears to the Central Government that any person has been guilty of any offence in relation to the company for which he is criminally liable, the Central Government shall refer the matter to the Advocate General or the Public Prosecutor.

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.

**142. Power of company to appoint inspectors.** (1) A company may by a special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Central Government, except that, instead of reporting to the Central Government, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Central Government.

**143. Report of inspectors to be evidence.** A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

**144. Qualification and appointment of auditors.** (1) No person shall be appointed or act as an auditor of any company other than a private company not being the subsidiary company of a public company unless he holds a certificate from the Central Government entitling him to act as an auditor of companies :

Provided that a firm whereof all the partners practising in India hold such certificates may be appointed by its firm-name to be auditor of a company and may act in its firm-name.

(2) The Central Government may, by notification in the official Gazette and after previous publication, make rules providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation :

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practise as a public accountant.

(2A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

- (a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates ;
- (b) prescribe the qualifications for enrolment on the Register and the fees therefor ;
- (c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees ;
- (d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register ;
- (e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the

interests principally affected or having special knowledge of accountancy in India, to advise him on all matters of administration relating to accountancy, and to assist him in maintaining the standard of qualification and conduct of persons enrolled on the Register ;

- (f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Central Government may select, to advise him and the Indian Accountancy Board on any matter that may be referred to them.

(2B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.

(3) Every Company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting,

(4) If an appointment of an auditor is not made at an annual general meeting, the Central Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons : that is to say,—

- (i) a director or officer of the company; and
- (ii) a partner of such director or officer ; and
- (iv) any person indebted to the company ;

shall not be appointed auditors of the company and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting :

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

145. Powers and duties of auditors. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet and profit and loss account laid before the company in general meeting during their tenure of office, and the report shall state :—

- (a) whether or not they have obtained all the information and explanations they have required; and
- (b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and
- (c) whether or not such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company; and
- (d) Whether in their opinion books of account have been kept by the company as required by section 180.

(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

(5) If any auditor's report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees.

**146. Rights of preference shareholders, etc., as to receipt and inspection of reports, etc.** (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets and profit and loss accounts of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act:

Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company.

## CARRYING ON BUSSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS

**147. Liability for carrying on business with fewer than seven or, in the case of a private company, two members.** If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other compnny, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

## SERVICE AND AUTHENTICATION OF DOCUMENTS

**148. Service of documents on company.** A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

**149. Service of documents on registrar.** A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leavin it for him at his office.



**150. Authentication of documents.** A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

### **TABLES, FORMS AND RULES AS TO PRESCRIBED MATTERS**

**151. Application and alteration of tables and forms, and power to make rules as to prescribed matters** (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The Central Government may alter any of the tables and forms in the First Schedule, so that it does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(3) Any alteration or addition made under sub-section (2) shall be published in the official gazette, and on such publication the table or form as so altered or the added form, as the case may be, shall have effect as if enacted in this Act, but no alteration made by the Central Government in Table A in the First Schedule shall affect any company registered before the alteration, or repeat, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Central Government may make rules providing for all or any matters which by this Act are to be prescribed by its authority.

(5) Every such rule shall be published in the official Gazette and on such publication shall have effect as if enacted in this Act.

### **ARBITRATION AND COMPROMISE**

**152. Power for companies to refer matters to arbitration.** (1) A company may by written agreement refer to arbitration, in accordance with the Arbitration Act, 1940, an existing or future difference between itself and any other company or person.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the Arbitration Act, 1940, shall apply to all arbitrations between companies and persons in pursuance of this Act.

**153. Power to compromise with creditors and members.** (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any

creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors or on all the members or class of members, as the case may be, and also on the company, or, in case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect to which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.

### **153A Provisions for facilitating arrangements and compromises**

(1) Where an application is made to the Court under section 153 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connec-

tion with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as 'the transferee company') the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

- (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any persons;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without winding up, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect,

(8) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, right and powers of every description, and the expression 'liabilities' includes duties.

(5) Notwithstanding the provisions of sub-section (6) of section 158, the expression 'company' in this section does not include any company other than a company within the meaning of this Act.

**153B. Power to acquire shares of shareholders dissenting from schemes or contract approved by majority.** (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company'), to another company whether a company within the meaning of the Act or not (in this section referred to as the transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in the value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given, the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company;

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

**CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY**

**154. Conversion of private company into public Company.** (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (18) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company shall, as on the date of the alteration, cease to be a private company and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provision aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company :

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other ground it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.

PART V

WINDING UP

PRELIMINARY

**155. (1) Mode of winding up.** The winding up of a company may be either.

- (i) by the Court; or
- (ii) voluntary; or
- (iii) subject to the supervision of the Court

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

CONTRIBUTORIES

**156 Liability as contributories of present and past members.** (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualification following (that is to say) :—

- (i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;
- (ii) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
- (iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
- (iv) in the case of a company limited by share, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member;
- (v) in the case of a company limited by guarantee, no contribution be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

- (vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;
- (vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves,

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up to contribute to the extent of any sums unpaid on any shares held by him.

**157. Liability of directors whose liability is unlimited.** in the winding up of a limited company any director whether past or present, whose liability is in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company :

Provided that—

- (i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;
- (ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;
- (iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs charges and expenses of the winding up.

**158. Meaning of "contributory".** The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

**159 Nature of liability of contributory.** (1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns .

**160 Contributories in case of death of member.** (1) If a contributory dies either before or after he has been placed on the list of contributories his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether movable or immovable or both, and of compelling payment thereof of the money due

(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.

**161 Contributories in case of insolvency of member.** If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

- (1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company, and
- (2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made

## WINDING UP BY COURT

**162 Circumstances in which company may be wound up by Court**  
A company may be wound up by the Court—

- (i) if the company has by special resolution resolved that the company be wound up by the court .
- (ii) if default is made in filing the statutory report or in holding the statutory meeting .
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year



- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven
- (v) if the company is unable to pay its debts,
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up,

**163 Company when deemed unable to pay its debts.** (1) A company shall be deemed to be unable to pay its debts—

- (i) if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor or
- (ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part, or
- (iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company

(2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf or in the case of a firm if it is signed by such agent or by legal adviser or any one member of the firm on behalf of the firm

**164 Winding up may be referred to District Court** Where the High Court makes an order for winding up the company under this Act, it may, if it thinks fit direct all subsequent proceedings to be had in a District Court, and thereupon such District Court shall for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purpose of such winding up, all the jurisdiction and powers of the High Court.

**165 Transfer of winding up from one District Court to another.** If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court

**166. Provisions as to applications for winding up.** An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately, or by the registrar :

Provided that—

- (a) a contributory shall not be entitled to present a petition for winding up a company unless—
- (i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven ; or
- (ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder ;
- (aa) the registrar shall not be entitled to present a petition for winding up a company—
- (i) except on the ground that from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and
- (ii) unless the previous sanction of the Central Government has been obtained to the presentation of the petition :

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.

- (b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held ;
- (c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court.

**167. Effect of winding up order.** An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

**168. Commencement of winding up by Court.** A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

**169. Court may grant injunction.** The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company restrain further proceeding in any suit or proceeding against the company, upon such terms as the Court thinks fit.

**170. Powers of Court on hearing petition.** (1) On hearing the petition, the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the court, are responsible for the default.

(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.

**171. Suits stayed on winding up order.** When a winding up order has been made, or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

**171A. Vacancy in the office of liquidator.** (1) For the purposes of this Act, so far as it relates to the winding up of companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or if there is no such official receiver then such person as the Central Government may, by notification in the official Gazette, appoint for the purpose.

(2) On the making of a winding up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the court.

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix.

**172. Copy of winding up order to be filed with registrar.** (1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order.

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

**173. Power of Court to stay winding up.** The Court may at any time after an order for winding up, on the application of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings, in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time on such terms and conditions as the Court thinks fit.

**174. Court may have regard to wishes of creditors or contributories.** The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

### OFFICIAL LIQUIDATORS.

**175. Appointment of official liquidator.** (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons other than the official receiver, to be called an official liquidator or official liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.

(3) If more persons than one are appointed to the office of official liquidator the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

## INDIAN COMPANIES ACT

### 176. Resignations, removals, filling up vacancies and compensation.

(1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court, and until the vacancy is so filled up the official receiver shall be and act as the official liquidator.

(3) There shall be paid to the official liquidator such salary or remuneration by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

**177. Official liquidator.** The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

**177A. Statement of affairs to be made to the liquidator.** (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:—

- (a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;
- (b) the debts and liabilities;
- (c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given.
- (d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary, manager or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

- (a) who are or have been directors or officers of the company;
- (b) who have taken part in the formation of the company at any time within one year before the relevant date;

- (c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required;
- (d) who are or have been within the said year officers of or in the employment of a company, which is or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly.

(8) In this section the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order.

**177B. Statement by liquidator.** (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177A, and not later than four, or with the leave of the Court, six months from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

- (a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of—

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- (i) cash and negotiable securities;
  - (ii) debts due from contributories,
  - (iii) debts due to and securities, if any, available to the company;
  - (iv) movable and immovable properties belonging to the company;
  - (v) unpaid calls; and
- (b) if the company has failed, as to the causes of the failure; and
- (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court.

**178. Custody of company's property.** (1) The official liquidator whether appointed provisionally or not shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company,

**178A. Committee of inspection in compulsory winding up.** (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator and who are to be members of the committee, if appointed,

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for direction as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of no more than twelve members being creditors and contributories of the company of

persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

**179. Powers of official liquidator.** The official liquidator shall have power, with the sanction of the Court, to do the following things:—

- (a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;
- (b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same;
- (c) to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;



- (d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal,
- (e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors,
- (f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business,
- (g) to raise on the security of the assets of the company any money requisite,
- (h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself. Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General
- (i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

**180. Discretion of official liquidator.** The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him

**181 Provision for legal assistance to official liquidator.** The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties. Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration

**182 Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court.** (1) The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator

When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested

**183 Exercise and control of liquidator's powers.** (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances

## ORDINARY POWERS OF COURT

**184 Settlement of list of contributories and application of assets.** (1) As soon as may be after making a winding up order, the Court shall

settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

**185. Power to require delivery of property.** The Court may at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is prima facie entitled.

**186. Power to order payment of debts by contributory.** (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit, and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

**187. Power of Court to make calls.** The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls, on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

**188. Power to order payment into bank.** The Court may order any contributory, purchaser or other person from whom money is due to the company

to pay the same into the account of the official liquidator in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

**189. Regulation of account with Court.** All moneys, bills, hundis, notes and other securities paid and delivered into the Bank where the liquidator of the company may have his account, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

**190. Order on contributory conclusive evidence.** (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

**191. Power to exclude creditors not proving in time.** The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

**192. Adjustment of rights of contributories.** The Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

**193. Power to order costs.** The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

**194. Dissolution of company.** (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

## EXTRAORDINARY POWERS OF COURT

**195. Power to summon persons suspected of having property of company.** (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his

possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them

(3) The Court may require him to produce any documents in his custody or power relating to the company, but where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination

#### **196 Power to order public examination of promoters, directors etc**

(1) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since its formation the Court may, after consideration of the application direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as director, manager or other officer thereof

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court,

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such question as the Court may put or allow to be put to him

(6) A person ordered to be examined under this section may at his own costs employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of

enabling him to explain or qualify any answer given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may, if it thinks fit adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

**197. Power to arrest absconding contributory.** The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such time as the Court may order.

**198. Saving of other proceedings.** Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

## ENFORCEMENT OF AND APPEAL FROM ORDERS

**199. Power to enforce orders.** All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

**200. Order made in any Court to be enforced by other Courts.** Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

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### **201. Mode of dealing with orders to be enforced by other Courts.**

Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

**202. Appeals from orders.** Re-hearings of and appeals from any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

## VOLUNTARY WINDING UP

### **203. Circumstances in which company may be wound up voluntarily.**

A Company may be wound up voluntarily—

- (1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence, of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- (2) if the company resolves by special resolution that the company be wound up voluntarily;
- (3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up, and the expression 'resolution for voluntarily winding up, when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section.

**204. Commencement of voluntary winding up.** A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntarily winding up.

**205. Effect of voluntary winding up on status of company.** When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall notwithstanding anything to the contrary in its articles, continue until it is dissolved.

**206 Notice of resolution to wind up voluntarily.** (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty

**207 Declaration of solvency** (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in subsection (1) of this section

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as a 'members' voluntary winding up', and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditors' voluntary winding up'

## MEMBERS VOLUNTARY WINDING UP

**208. Provisions applicable to a members' voluntary winding up**  
The provisions contained in sections 208A to 208E, both inclusive, shall apply in relation to a members' winding up

**208A. Power of company to appoint and fix remuneration of liquidators** (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator, sanctions the continuance thereof

**208B Power to fill vacancy in office of liquidator.** (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.



**208C. Power of liquidator to accept shares, etc., as consideration for sale of property of company.** (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the Arbitration Act, 1940, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitration in pursuance of this section.

**208D. Duty of liquidator to call general meeting at end of each year.** (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

**209E. Final meeting and dissolution.** (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved.

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

#### CREDITORS' VOLUNTARY WINDING UP

**209. Provision applicable to a creditors' voluntary winding up.** The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditors' voluntary winding up.

**209A. Meeting of creditors.** (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next

following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that subsection.

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid; and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4); the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty.

**209B. Appointment of liquidator.** The creditors and the the company at their respective meetings mentioned in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator.

Provided that in the case of different persons being nominated, any director member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

**209C. Appointment of committee of inspection.** The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting appoint such number of persons as they think fit to act as members of the committee not exceeding five in number :

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

**209D. Fixing of liquidator's remuneration and cesser of directors' powers.** (1) The committee of inspection, or, if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.

**209E. Power to fill vacancy in office of liquidator.** If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of the Court, the creditors may fill the vacancy.

**209F. Application of section 208C to a creditors' voluntary winding up.** The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

**209G. Duty of liquidator to call meetings of company and of creditors at end of each year.** (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealing and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

**209H. Final Meeting and Dissolution.** (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made provisions of this sub-section as to the making of the return shall in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved.

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

#### MEMBERS' OR CREDITORS' VOLUNTARY WINDING UP

**210. Provisions applicable to every voluntary winding up.** The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a creditors' winding up.

**211. Distribution of Property of Company.** Subject to the provisions of this Act as to preferential payments, the property of a company shall, on is

winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

**212. Powers and duties of liquidator in voluntary winding up.** (1) The liquidator may—

- (a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers,
- (b) without the sanction referred to in clause (a) exercise any of the other powers by this Act given to the liquidator in a winding up by the Court
- (c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories
- (d) exercise the power of the Court of making calls,
- (e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment or, in default of such determination, by any number not less than two

**213. Power of Court to appoint and remove liquidator in voluntary winding up** (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator

(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator

**214 Notice by liquidator of his appointment** (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

**215. Arrangement when binding on creditors.** Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

**216. Power to apply to Court to have questions determined of power exercised.** (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up;

Such application shall be made—

- (a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court and
- (b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind up the company.

(3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

**217. Cost of voluntary winding up.** All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.

**218. Saving for rights of creditors and contributories.** The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

[219. There is no section 219.]

**220. Power of Court to adopt proceeding of voluntary winding up.** Where a company is being wound up voluntary, and an order is made for winding up by the Court, the Court may if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

WINDING UP SUBJECT TO SUPERVISION OF COURT

**221. Power to order winding up subject to supervision.** When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

**222. Effect of petition for winding up subject to supervision.** A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

**223. Court may have regard to wishes of creditors and contributories.** The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

**224. Power for Court to appoint or remove liquidator.** (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal or by death or resignation.

**225. Effect of supervision order.** (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.



# INDIAN COMPANIES ACT

**226 Appointment in certain cases of voluntary liquidator to office of official liquidator.** Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

## SUPPLEMENTAL PROVISION

**227. Avoidance of transfer. etc., after commencement of winding up.** (1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator and every alteration in the status of the members of the company made after commencement of the winding up shall be void.

(2) In the case of winding up by or subject to the supervision of the Court every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise order, be void.

**228 Debts of all descriptions to be proved** In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value,

**229. Application of insolvency rules in winding up of insolvent companies** In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under winding up, and make such claims against the company as they respectively are entitled to by virtue of this section

**230. Preferential payments.** (1) In a winding up there shall be paid in priority to all other debts,

- (a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;
- (b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand ~~rupees~~ for each clerk or servant,

- (c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date;
- (d) compensation payable under the Workmen's Compensation Act 1923, in respect of the death or disablement of any officer or employee of the company;
- (e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company and ;
- (f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act.

The foregoing debts shall—

- (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and
- (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and
- (b) in any other case, the date of the commencement of the winding up.

**230A. Disclaimer of property.** (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its

binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property :

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period disclaim the contract, the company shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such

vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose :

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person—

- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
- (b) if the Court think fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interests in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenant in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury and may accordingly prove the amount as a debt in the winding up.

**231. Fraudulent preference.** (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be valid.

**232. Avoidance of certain attachments, executions, etc.** (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of

any of the properties of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Crown.

**233 Effect of floating charge** Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

**234. General scheme of liquidation may be sanctioned.** (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them:—

- (i) pay any classes of creditors in full,
- (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable;
- (iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims present or future, certain or contingent, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any securities for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of the section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

**235. Power of Court to assess damages against delinquent directors, etc.** (1) Where in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer,

misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

**236. Penalty for falsification of books.** If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or marks, or is privy to the making of, any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine

**237. Prosecution of delinquent directors.** (1) If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspection and taking copies of any documents, being information or documents in the possession or under the control liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the Central Government for further inquiry, and the Central Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Central Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2)

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate General or the public prosecutor and if advised to do so institute proceedings:

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

(7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this subsection the expression 'agent' in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

(8) If any person fails or neglects to give assistance in manner required by sub-section (7), the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

**238. Penalty for false evidence.** If any person, upon any examination upon oath authorised under this Act or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

**238A. Penal provision** (1) If any person, being a past or present director, managing agent, manager or other officer of a company which at the time of the commission of the alleged offence is being wound up whether by or under the supervision of the Court or voluntary or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up—

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company; or
- (b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up; or
- (c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up; or
- (d) within twelve months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company; or
- (e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards; or
- (f) makes any material omission in any statement relating to the affairs of the company; or
- (g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof; or
- (h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company; or
- (i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting the property or affairs of the company; or
- (j) within twelve months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company; or
- (k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with



altering or making any omission in any, document affecting or relating to the property or affairs of the company; or

- (l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any parts of the property of the company by fictitious losses or expenses; or
- (m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for; or
- (n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
- (o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company; or
- (p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up:

he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this sub-section, with imprisonment for a term not exceeding five years, and, in the case of any other offence, with imprisonment for a term not exceeding two years:

Provided that it shall be a good defence to a charge under any of clauses (b), (c), (d), (f), (n), and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i), and (j), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges, or disposes of any property in circumstances which amount to an offence under clause (o) of sub-section (1) every person who takes in pawned or pledged or otherwise receives the property knowing it to be pawned, pledged or disposed of, in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years.

### **239. Meeting to ascertain wishes of creditors or contributories. (1)**

Where by this Act the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories as proved to it by any sufficient evide-

noe, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

**240. Documents of company to be evidence.** Where any company is being wound up, all documents of the company and of the liquidators shall, as between contributories of the company, be prima facie evidence of the truth of all matters purporting to be therein recorded.

**241. Inspection of documents.** After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

**242. Disposal of documents of company.** (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say):—

- (a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs,
- (b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

**243. Power of Court to declare dissolution of company void.**

(1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

**244. Information as to pending liquidations.** (1) Where a company is being wound up, if the winding up is not concluded within one year after its com-

<sup>a</sup> mencement, the liquidator shall, once in each year and at intervals of not more than twelve months, until the winding up is concluded, file in Court or with the registrar, as the case may be, a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.

**244A. Payment by liquidator into bank.** (1) Every liquidator of a company which is being wound up by the Court shall, in such manner and at such times as may be prescribed, pay the money received by him into a schedule bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934 :

Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the proscribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expense occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.

**244B. Unclaimed dividends and undistributed assets to be paid into Companies Liquidation Account.** (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed

for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due:

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under the section shall pay interest on the amount retained at the rate of twenty per cent per annum and shall also be liable

to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the company.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single Province which are not trading corporations

• **245. Court or person before whom affidavit may be sworn** (1) Any affidavit required to be sworn under the provision or for the purposes of this Part may be sworn in British India, or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by the Central Government or the Crown Representative, or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

## Rules

**246. Power of High Court to make rules.** (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto and for voluntary windingup (both members' and creditor's), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act, and for giving effect to the provisions hereinbefore contained as the reduction of the capital and the sub-division of the shares of a company and generally for all applications to be made to the Court under the provisions of this Act and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by the Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

- (a) holding and conducting meetings to ascertain the wishes of creditors and contributories,
- (b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;

- (c) requiring delivery of property or documents to the liquidator.
- (d) making calls;
- (e) fixing a time within which debts and claims must be proved :

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

## REMOVAL OF DEFUNCT COMPANIES FROM REGISTER

**247. Registrar may strike defunct company off register.** (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation or does not within one month after sending the second letter receive any answer, he may publish in the official Gazette, and send to the company by post a notice, that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette, and, on the publication in the Official Gazette of this notice, the company shall be dissolved : Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time

of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

## PART VI

### Registration Office and Fees

**248. Registration Offices.** (1) For the purpose of the registration of companies under this Act, there shall be office at such places as the Central Government thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The Central Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the Central Government.

(4) The Central Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Central Government, not exceeding one rupee for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, or of such fees as the Central Government may appoint not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the Central Government otherwise directs, be done to or by the existing registrar of joint stock companies or in his absence to or by such person as the Central Government may for the time being authorise, but in the event of the Central Government altering the constitution of the existing registry offices or any

of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered office of the companies to be registered as the Central Government may appoint.

**249. Fees.** (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified or such smaller fees as the Central Government may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

## **249A. Enforcing submission of returns and documents to registrar.**

(1) If a company, having made default in complying with any provision of this Act which requires it to file with, deliver or send to, the registrar any return, account or other document, or to give notice to him of any matter, fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the Court may, on an application made to the Court by any member or creditor of the company or by the registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.

## PART VII

### **Application of Act to Companies formed and registered under former Companies Acts**

**250. Application of Act to Companies formed and registered under former Companies Acts.** In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company;

Provided that—

- (1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act 1860, or the Indian Companies Act, 1882;



- (2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be

**251. Application of Act to Companies registered but not formed under former Companies Acts** This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act;

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

**252 Mode of transferring.** A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

#### PART VIII

### Companies Authorised to Register under this Act.

**253. Companies capable of being registered** (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

- (i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and
- (ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or Indian Law other than this Act or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up :

(2) Provided as follows :—

- (a) a company having the liability of its members limited by Act of Parliament or Indian Law or by Letter Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section ;
- (b) a company having the liability of its members limited by Act of Parliament or Indian Law or by Letters Patent shall not register in

pursuance of this section as an unlimited company or as a company limited by guarantee,

- (c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares,
- (d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose;
- (e) where a company not having the liability<sup>1</sup> of its members limited by Act of Parliament or Indian Law or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting,
- (f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section

**254. Definition of "joint-stock company"** For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares

**255 Requirements for registration by joint-stock companies.** Before the registration in pursuance of this Part of a joint-stock company, there shall be delivered to the registrar the following documents (that is to say) —

- (1) a list showing the names, addresses and occupation of all persons who on a day named in the list, not being more than six clear days

before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number,

- (2) a copy of any Act of Parliament, Indian Law, Royal Charter, Letters Patent, deed of settlement, contract of co partnership or other instrument constituting or regulating the company, and
- (3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say) —
  - (a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists,
  - (b) the number of shares taken and the amount paid on each share,
  - (c) the name of the company, with the addition of the word "Limited" as the last word thereof, and
  - (d) in the case of a company intended to be registered as a company limited by guarantee the resolution declaring the amount of the guarantee

**256 Requirements for Registration by other than joint-stock companies** Before the registration in pursuance of this Part of the company not being a joint-stock company, there shall be delivered to the registrar—

- (1) a list showing the names, addresses and occupations of the directors of the company and
- (2) a copy of any Act of Parliament, Indian Law, Letters Patent, deed of settlement, contract of co partnership or other instrument constituting or regulating the company, and
- (3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee

**257 Authentication of statement of existing companies** The list of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

**258. Registrar may require evidence as to nature of company** The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined

**259. On registration of banking company with limited liability, notice to be given to customers** (1) Where a banking company, which was in existence on the first day of May eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering

give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not otherwise, the certificate of registration with limited liability shall have no operation.

**260. Exemption of certain companies from payment of fees.** No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Indian Law or by Letters Patent.

**261. Addition of "Limited" to name.** When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as part of its name.

**262. Certificate of registration of existing companies.** On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

**263. Vesting of property on registration.** All property movable and immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

**264. Saving of existing liabilities.** The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into by, to, with, or on behalf of, the company before registration.

**265. Continuation of existing suits.** All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member therein, may be continued in the same manner as if the registration had not taken place, nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

**266. Effect of registration under Act.** When a company is registered in pursuance of this Part—

- (i) all provisions contained in any Act of Parliament, Indian Law, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;
- (ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say)—
  - (a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;
  - (b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;
  - (c) Subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of Parliament or Indian Law relating to the company;
  - (d) subject to the provisions of this section, the company shall not have, power, without the sanction of the Central Government to alter any provision contained in any Letters Patent relating to the company
  - (e) the company shall not have power to alter any provision contained in the Royal Charter or Letters Patent with respect to the object of the company;
- (i) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid: and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply;

(lii) the provisions of this Act with respect to—

- (a) the registration of an unlimited company as limited;
- (b) the powers of an unlimited company on registration as a limited company to increase the nominal of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up ;
- (c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up ;

shall apply notwithstanding any provisions contained in any act of Parliament, Indian Law, Royal Charter, deed of settlement, contract of copartnery, Letters Patent or other instrument constituting or regulating the company ;

- (iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of copartnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act ;
- (v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, Indian Law, deed of settlement, control of copartnery, Letters Patent or other instrument, constituting or regulating the company be vested in the company.

**267. Power to substitute memorandum and articles for deed of settlement.** (1) Subject to the provisions of this section a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the object of a company shall, so far as applicable, apply to an alteration under this section with the following modifications :—

- (a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum and articles ;
- (b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the object of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an Indian Law, a Royal Charter or Letters Patent.

**268. Power of court to stay or restrain proceedings.** The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

**269. Suit stayed on winding up order.** Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

## PART IX

### Winding up of Unregistered Companies

**270. Meaning of "unregistered company."** For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Indian Law, nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act 1882, or under this Act but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

**271. Winding up of unregistered Company.** (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

- (i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business, and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;
- (ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;
- (iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—

- (a) if the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs,
- (b) if the company is unable to pay its debts,
- (c) if the Court is of opinion that it is just and equitable that the company should be wound up,
- (vi) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts -
- (i) if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business or by delivering to the secretary or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditors
- (b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding has not been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company, otherwise serving the same in such manner as the Court may approve or direct the company has not within ten days after service of the notice paid or secured or compounded for the debt or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding and against all costs damages and expenses to be incurred by him by reason of the same
- (c) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied and
- (d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first mentioned enact



ment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act

(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British India it may be wound up as an unregistered company under this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated

#### **272. Contributories in winding up of unregistered companies (1)**

In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid

(2) In the event of any contributory dying or being adjudged insolvent the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply

**273. Power to stay or restrain proceedings.** The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company

**274. Suits stayed on winding up order.** Where an order has been made for winding up an unregistered company, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court and subject to such terms as the Court may impose

**275. Directions as to property in certain cases.** If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the winding up order, or by any subsequent order, direct that all or any part of the property, movable and immovable and including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property

**276. Provisions of this Part cumulative.** The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the cases of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART X

**Companies established outside British India**

**277. Requirements as to companies established outside British India.**

(1) Every company incorporated outside British India, which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

- (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and manager (if any) of the company;
- (d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;
- (e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company;

and, in the event of any alteration being made in any such instrument or in any such address or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

- (i) in a case where by the law for the time being in force, of the company in which the company is incorporated such company is required to file with the public authority an annual balance-sheet—three copies of that balance-sheet and if the balance-sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements in triplicate as shall furnish such information; or
  - (ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the company is incorporated,—such statement in triplicate in the form of a balance-sheet as such company would, if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act.
- (4) Every company to which this section applies and which uses the word "Limited" as part of its name, shall—
- (a) in every prospectus inviting subscriptions for its shares or debentures in British India state the country in which the company is incorporated; and
  - (b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place; and
  - (c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill-heads and letter papers and in all notices, advertisements and other official publications of the company.
- (5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all billheads and letter papers, notices, advertisements and other official publications of the company in British India, and to be affixed on every place where it carries on business.
- (6) If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.
- (7) For the purposes of this section—

- (a) the expression "certified," means certified in the prescribed manner to be a true copy or a correct translation;
- (b) the expression "place of business" includes a share transfer or share registration office;
- (c) the expression "director" includes any person occupying the position of director, by whatever name called; and
- (d) the expression "prospectus" means any prospectus, notice, circular advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(8) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

**277A. Restriction on sale and offer for sale of share.** (1) It shall not be lawful for any person—

- (a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established, or when formed will or will not establish, a place of business in British India, unless—
  - (i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar;
  - (ii) the prospectus states on the face of it that the copy has been so delivered;
  - (iii) the prospectus is dated; and
  - (iv) the prospectus otherwise complies with this Part; or
- (b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part:

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 23A to be a prospectus issued by the company that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277B, the expressions 'prospectus', 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.

**277B. Requirements as to prospectus.** (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 277A, must—

- (a) contain particulars with respect to the following matters:—
  - (i) the objects of the company ;
  - (ii) the instrument constituting or defining the constitution of the company ;
  - (iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected ;
  - (iv) an address in British India where the said instrument, enactment or provisions, or copies thereof, and if the same are in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected ;
  - (v) the date on which and the country in which the company was incorporated ;
  - (vi) whether the company has established a place of business in British India and, if so, the address of its principal office in British India ;

Provided that the provisions of sub-clauses (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business ;

- (b) subject to the provisions of this section, state the matters specified in subsection (1A) of section 93 and set out the reports specified in that section :

Provided that—

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the object with which the company was formed.

(ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed, he proves that he was not cognisant thereof ; or
- (b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part ; or
- (c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of the Court, having regard to all the circumstances of the case, reasonably to be excused;

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of subsection (1) of section 93, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

**277C. Restriction on canvassing for sale of shares.** (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public.

(2) In this sub-section the expression 'shall' shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred.

**277D. Registration of charges.** (1) The provisions of section 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies

(Amendment) Act, 1938, by a company incorporated outside British India which has an established place of business in British India.

Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, subclause (i) of the proviso to sub-section (1) of section 109 and proviso to sub-section (1) of section 109A shall apply as if the property wherever situated were situated outside British India.

(2) This section shall be deemed not have come into force until the commencement of the Indian Companies (Amendment) Act, 1938.

Provided that where the provisions of section 109 and of sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938.

**277E. Notice of appointment of receiver.** The provisions of sections 118 and 119 shall mutatis mutandis apply to the case of all companies incorporated outside British India but having an established place of business in British India and the provisions of section 190 shall apply to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India :

Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.

## PART XA.

### BANKING COMPANIES

**277F. Definition of banking company.** A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely :—

- (1) the borrowing, raising or taking up of money; the lending or advancing of money either upon or without security; the drawing, making accepting, discounting, buying, selling, collecting and

dealing in bills of exchange, hundees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, travellers cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit, or for safe custody or otherwise; the collecting and transmitting of money and securities;

- (2) acting as agents for Governments or local authorities for any other persons or persons; the carrying on of agency business of any description other than the business of a managing agent of a company not being a banking company including the power to act as attorneys and to give discharges and receipts;
- (3) contracting for public and private loans and negotiating and issuing the same;
- (4) the promoting, effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures or debenture stock of any company, corporation or association and the lending of money for the purpose of any such
- (5) carrying on and transacting every kind of guarantee and indemnity business;
- (6) promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new, and developing or forming the same, through the instrumentality of syndicates or otherwise;
- (7) acquisition by purchase, lease, exchange, hire or otherwise of any property immovable or movable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realisation of any securities held by the company or to prevent or diminish any apprehended loss or liability;
- (8) managing, selling and realising all property movable and immovable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;



- (9) acquiring and holding and generally dealing with any property and any right, title or interest in any property movable or immovable which may form part of the security for any loans or advance or which may be connected with any such security;
- (10) undertaking and executing trusts;
- (11) undertaking the administration of estates as executor, trustee or otherwise;
- (12) taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company;
- (13) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;
- (14) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;
- (15) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;
- (16) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section;
- (17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.

Provided that any company which uses as part of the name under which it carries on business the word "bank" "banker" or banking shall be deemed to be a banking company notwithstanding that the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, is not shown to be the principal business of the company.

**277G. Limitation of activities of banking company.** (1) No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word 'bank', 'banker' or 'banking', shall be registered under this Act, unless the memorandum limits the objects of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to with-

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drawal by cheque, draft or otherwise along with some or all of the forms of business specified in section 277F.

(2) No banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the said Act carry on any form of business other than those specified in section 277F.

Provided that the Central Government may, by notification in the official Gazette, specify, in addition to the businesses set forth in clauses (1) to (17) of section 277F, other forms of business which it may be lawful under this section for a banking company to engage in.

**277HH. Prohibition of employment of managing agent and restrictions on certain forms of employment.** No banking company, whether incorporated in or outside British India which carries on business in British India, shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944 employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the company, or any person having a contract with the company for its management for a period exceeding five years at any one time.

Provided that the period of five years shall, for the purposes of this section, be computed from the date on which this section comes into force:

Provided further that any such contract may be renewed or extended for a further period not exceeding five years at a time if and so often as the directors think fit.

**277I. Restriction on commencement of business and conditions for carrying on business by banking company.** (1) Notwithstanding anything contained in section 103, no banking company incorporated under this Act on or after the 15th day of January 1937 shall commence business unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital, and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.

(2) No banking company, whether incorporated in or outside British India, if incorporated on or after the 15th day of January 1937, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, carry on business in British India unless it satisfies the following conditions, namely:-

(a) that the subscribed capital of the company is not less than half the authorised capital, and the paid up capital is not less than half the subscribed capital, and

(b) that the capital of the company consists of shares only, or ordinary shares and such preference shares as may have been issued before the commencement of the Indian Companies (Amendment) Act, 1944, only, and

(c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the shareholder, whether a preference shareholder or an ordinary shareholder, to the paid up capital of the company.

**277J. Prohibition of charge on unpaid capital.** No banking company shall create any charge upon any unpaid capital of the company, and any such charge shall be invalid.

**277K. Reserve fund.** (1) Every banking company shall, after the commencement of the Indian Companies (Amendment) Act, 1936, maintain a reserve fund.

(2) Every banking company shall out of the declared profits of each year and before any dividend is declared transfer a sum equivalent to not less than twenty per cent. of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

(3) A banking company shall invest the amount standing to the credit of its reserve fund in Government securities or in securities mentioned or referred to in section 20 of the Indian Trusts Act, 1882, or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section (2) of the Reserve Bank of India Act, 1934 :

Provided that the provision of the sub-section shall not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act, 1924, till after the expiry of two years from the commencement of the said Act.

**277L. Cash reserve.** (1) Every banking company shall maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent. of the time liabilities and five per cent. of the demand liabilities of such company and shall file with the registrar before the tenth day of every month three copies of a statement of the amount so held on the Friday of each week of the preceding month with particulars of the time and demand liabilities of each such day.

(2) For the purposes of sub-section (1) "demand liabilities" means liabilities which must be met on demand, and "time liabilities" means liabilities which are not demand liabilities.

(3) Nothing in this section or in section 277K shall apply to a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(4) If default is made in complying with the requirement of section 277G, section 277H, section 277HH, section 277I, section 277J, section 277K or section 277M or with the requirement of this section as to the maintenance of a cash reserve, every director or other officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues, and if default is made in complying with the requirement of this section as to the filing of the statement referred to in sub-section (1), to a fine not exceeding one hundred rupees for every day during with the default continues.

**277M. Restriction on nature of subsidiary companies.** (1) A banking company shall not form any subsidiary company except a subsidiary company formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as executor, trustee or otherwise and such other purposes set forth in section 277F as are incidental to the business of accepting deposits of money on current account or otherwise.

(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of the company :

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936.

**277N. Power of Court to stay proceeding.** (1) The Court may on the application of a banking company which is temporarily unable to meet its obligations make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it shall think fit and proper and may from time to time extend the period.

(2) No such application shall be maintainable unless accompanied by a report of the registrar:

Provided, however, the Court may, for sufficient reasons, grant interim relief, even if the application is not accompanied by such report.

(3) The registrar shall for the purposes of his report be entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued under section 144.

## PART XI.

### SUPPLEMENTAL

#### Legal proceedings, offences, etc.

**278. Cognizance of offences** (1) No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be, punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency-Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

**279. Application of fines.** The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

**280. Power to require limited company to give security for costs.** Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

**281. Power of Court to grant relief in certain cases.** (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following:—

- (a) directors of a company ;
- (b) managers and managing agents of a company ;
- (c) officers of a company ;
- (d) persons employed by a company as auditors, whether they are or are not officers of the company.

**282. Penalty for false statement.** Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

**282A. Penalty for wrongful withholding of property.** Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other

than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.

**262.B Penalty for misapplication of securities by employers.** (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the commencement of the Indian Companies (Amendment) Act, 1936, shall be either deposited in a Post Office Savings Bank account or invested in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the said Act which are not so deposited or invested shall be so deposited or invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys.

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in this behalf to the company to see the bank's receipt for any money or security such as is referred to in sub-section (1) and sub-section (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees.

(6) Nothing in sub-section (2) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognised provident fund within the meaning of clause (a) of section 58A of the Indian Income-tax Act, 1922 (XI of 1922) or, the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8 and 9 of the Indian Income-tax (Provident funds Relief) Rules.

**283. Penalty for improper use of word "Limited".** If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

**284. Saving of pending proceedings for winding up.** The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936 but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act 1936, had not been passed.

**285. Saving of documents.** Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

**286. Former registration offices, registers and registrars, continued.** (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act

**287. Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.** Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

**288. Construction of "registrar of joint-stock companies" in Act, XXI of 1860.** In sections I and 18 of Act No. XXI of 1860 (for the registration of Literary, Scientific and Charitable Societies), the words "registrar of joint-stock companies" shall be construed to mean the registrar under this Act.

**289. Act not to apply to Banks of Bengal, Madras or Bombay.** Save as provided in sections 188 and 189, nothing in this Act, shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

**289A. Application of Act to non-trading companies with purely provincial objects.** The powers conferred by this Act on the Central Government shall, in relation to companies with objects confined to a single Province which are not trading corporations, be powers of the Provincial Government.

**290. Repeal of Acts and Savings.** (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof:

Provided that the repeal shall not affect—

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- (a) the incorporation of any company registered under any enactment hereby repealed; nor
- (b) Table B in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor
- (c) Table A in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act

(3) The mention of particular matters in this section or in any other section of this Act, shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

## SCHEDULES

### THE FIRST SCHEDULE

(See sections 2, 17, 18, 79, 266.)

#### TABLE A.

**[The Compulsory regulations are in black types.]**  
**Regulations for management of a company limited by shares.**

#### PRELIMINARY

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and vice versa, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

#### BUSINESS

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

#### SHARES

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or other-



wise, as the company may from time to time by special resolution determine and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company liable to be redeemed.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may subject to the provisions of section 86A of the Indian Companies Act, 1913, be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall mutatis mutandis apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913 as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon : Provided that, in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment, of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. Except to the extent allowed by section 54A of the Indian Companies Act, 1913, no part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

#### LIEN

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable, thereon.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made under such sum in respect of which the lien exists as is presently payable, nor until the expira-

tion of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceeding in reference to the sale.

#### CALLS ON SHARES

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the persons from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares, held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

TRANSFER AND TRANSMISSION OF SHARES

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve :

I, A.B. of \_\_\_\_\_, in consideration of the sum of rupees \_\_\_\_\_ paid to me by C. D. of \_\_\_\_\_ (hereinafter called "the said transferee"), do hereby transfer the share (or shares) numbered \_\_\_\_\_ in the undertaking called the \_\_\_\_\_ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid, At witness our hands the \_\_\_\_\_ day of \_\_\_\_\_  
 (Witness to the signatures of, etc

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

- (a) a fee not exceeding two rupees is paid to the company in respect thereof; and
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transfer to make the transfer.

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal.

21. The executors or administrators of a deceased share holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent per-

son could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of the share by the deceased or insolvent person before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

### FORFEITURE OF SHARES

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of nonpayment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

#### CONVERSION OF SHARES INTO STOCK

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the share from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

#### SHARE-WARRANTS

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp-duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys, on the shares in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the share shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share-warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from

time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company or attend or vote or exercise any other privilege of a member at a meeting of the company or be entitled to receive any notice from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

#### ALTERATION OF CAPITAL

41. The directors may, with the sanction of the company in general meeting increase the share capital by such sum, to be divided into shares of such amount as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may by ordinary resolution,—

- (a) consolidate and divide its share capital into shares of larger amount than its existing shares.
- (b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913;
- (c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

44A. The Company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.

#### GENERAL MEETINGS

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held within eighteen months from the date of its incorporation and thereafter once at least in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting or, in default, at such time in the months following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting, being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and an extraordinary general meeting shall also be called on such requisition, or in default, may be called by such requisitionists as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any directors or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

49. Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions, fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner,

it may, as may be prescribed by the company in general meeting, to such persons as are, under the Indian Companies Act, 1913, or the regulations of the company, entitled to receive such notices from the company, but the accidental omission to give notice to or the non receipt of notice by any member shall not invalidate the proceedings at any general meetings

50 All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors

51 No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business, save as herein otherwise provided two members in the case of a private company and five members in the case of any other company personally present shall be a quorum

52 If within half an hour from the time appointed for the meeting a quorum is not present, the meeting if called upon the requisition of members, shall be dissolved, in any other case it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum

53 The chairman if any, of the board of directors shall preside as chairman at every general meeting of the company

54 If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman the members present shall choose someone of their number to be chairman.

55 The chairman may with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place When a meeting is adjourned for ten days or more notice of the adjourned meeting shall be given as in the case of an original meeting save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting

56 At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act, 1913, and unless a poll is so demanded a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to



**that effect in the book of the proceedings of the Company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.**

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

#### VOTES OF MEMBERS

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him,

61. In the case of joint-holders, the vote of the senior who tenders a vote whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders, and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation either under the common seal, or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless he is a member of the company.

66. The instrument appointing a proxy and the power-of-attorney or other authority (if any), under which it is signed or a notariaily certified copy of that power or authority shall be deposited at the registered office of the company not less than seventy-two hours before the time

for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67 An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve.—

Company, Limited

"I of in the district of  
being a member of the Company, Limited, hereby  
appoint of as my proxy to vote for me and on  
my behalf at the ordinary or extraordinary, as the case may be, general meeting  
of the company to be held on the day of and at  
any adjournment thereof "

Signed this day of

### DIRECTORS

68 The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association

69 The remuneration of the directors shall from time to time be determined by the company in general meeting

70 The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 45 of the Indian Companies Act, 1913

### POWERS AND DUTIES OF DIRECTORS

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of the articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72 The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of directors, but his appointment

shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending of the registrar an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into and notice of any copies of special resolutions and a copy of the register of directors and notifications of any charges therein.

75. The directors shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors;
- (b) of the names of the directors present at each meeting of the directors and of any committee of the directors;
- (c) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

#### THE SEAL

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

#### DISQUALIFICATION OF DIRECTORS

77. The office of director shall be vacated if the director—

- (a) fails to obtain within the time specified in sub-section (1) of section 85 of the Indian Companies Act, 1913, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment; or
- (b) is found to be of unsound mind by a Court of competent jurisdiction;

- (c) is adjudged insolvent; or
- (d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or
- (e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or
- (f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is longer, without leave of absence from the board of directors; or
- (g) accepts a loan from the company; or
- (h) is concerned or participates in the profits of any contract with the company; or
- (i) is punished with imprisonment for a term exceeding six months :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director, but a director shall not vote in respect of any such contract or work, and if he does so vote his vote, shall not be counted.

#### ROTATION OF DIRECTORS

**78.** At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, onethird of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one third shall retire from office.

**79.** The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day these to retire shall (unless they otherwise agree among themselves) be determined by lot.

**80.** A retiring director shall be eligible for re-election.

**81.** The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

**82.** If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of

them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. Subject to the provisions of sections 83 A and 88 B of the Indian Companies Act, 1913, the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time, as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

#### PROCEEDINGS OF DIRECTORS

87. The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

#### DIVIDENDS AND RESERVE

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the shares.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

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**101** Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

**102.** No dividend shall bear interest against the company.

### **ACCOUNTS**

**103.** The directors shall cause to be kept proper books of account with respect

- (a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place,
- (b) all sales and purchases of goods by the company,
- (c) the assets and liabilities of the company.

**104.** The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.

**105.** The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no members (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

**106** The directors shall as required by sections 181 and 181 A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss account, income and expenditure account, balance-sheets, and reports as are referred to in those sections.

**107.** The profit and loss account shall in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act, 1913, show, arranged under the most convenient heads, the amount of gross income, (diminished in the case of a banking company by the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts) distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, fourteen days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

### AUDIT

111. Auditors shall be appointed and their duties regulated in accordance with sections 143 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

### NOTICES

112 (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British



India supplied for the purpose by the persons claiming to be so entitled. or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of sharewarrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive notice of the meeting. Regulations, 78, 79, 80, 81 and 82 are not to be deemed to be included in the Articles of a private company other than a subsidiary of a public company.

### TABLE B.

(See sections 249 and 262)

#### Table of Fees to be paid to the Registrar

##### I.—By a company having a share capital

	Rs. 2 p.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of .. .. .	40 0 0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees .. .. .	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees .. .. .	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees .. .. .	1 0 0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration :	

Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any

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greater amount of fees than 1,000 rupees taking into account in the case of fees payable on an increase of share capital after registration, the fees paid on registration.

4. For registration of any existing company, except such companies as are by this Act, exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up . . . . . 3 0 0\*
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of . . . 3 0 0\*

11—By a company not having a share capital

Rs. a. p.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 . . . 40 0 0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 . . . . . 100 0 0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of . . . . . 400 0 0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable in respect of such increase if such increase had been stated in the articles of association at the time of registration.

Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.

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7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up ... .. 3 0 0\*
8. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of ... .. 3 0 0\*

"Provided that the aggregate of the fees payable in respect of the matters specified in the said items 5 and 6, or, as the case may be, 7 and 8 shall not exceed rupees three in a case in which both fees are payable in respect of a single document or transaction;

Provided further that the following reduced fees shall be paid to the registrar in respect of the filing of the returns of allotment prescribed by Section 104 of the Indian Companies Act, 1913, in the manner hereinafter mentioned, namely :—

In cases in which the aggregate paid up value of shares allotted does not exceed Rs. 25...	...	...	...	...	0 4 0
In cases in which the aggregate paid up value of the shares allotted exceeds Rs. 25, but does not exceed Rs. 50	...	...	...	...	0 8 0
In cases in which the aggregate paid up value of the shares allotted exceeds Rs. 50, but does not exceed Rs. 75	...	...	...	...	0 12 0
In cases in which the aggregate paid up value of the shares „ allotted exceeds Rs. 75, but does not exceed Rs. 100	...	...	...	...	1 0 0
In cases in which the aggregate paid up value of the shares allotted exceeds Rs. 100	...	...	...	...	3 0 0



The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.

Estimated amount of preliminary expenses.

Amount paid or intended to be paid to any promoter.

Consideration for the payment.

Dates of, and parties to every material Contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement).

Times and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company or, where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

If it is proposed to acquire any business, the account, as certified by the persons by whom the accounts of the business have been audited of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

(Signatures of the persons above named as directors

or proposed directors or of their agents authorised

in writing).

Date,

Rs. ....

Name of promoter.....

Amount Rs .....

Consideration.

## FORM II

**The Indian Companies Act, 1913.**

### STATEMENT IN LIEU OF PROSPECTUS

filed by

.....Limited,

Pursuant to sub-section (1) of section 154 of the Indian Companies Act, 1913.  
Presented for filling by

The nominal share capital of the company.	Rs..... ..
Divided into	Shares of Rs..... each. Shares of Rs.....each. Shares of Rs.e.....ach.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs... . each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and Addresses of Directors or proposed Directors and Managers or proposed Managers, and any provision in the Articles, or in any contract, as to appointment of and remuneration payable to Directors or Managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs....fully paid 2. Shares upon which Rs.... per share credited as paid. 3. Debenture Rs. .... 4. Consideration.
Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs.... Cash : . . . . . Rs.... Shares : . . . . . Rs.... Debentures : . . . . . Rs.... Goodwill : . . . . . Rs....

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or Rate of the commission.	Amount paid. Amount payable. Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	-----
Unless more than two years have elapsed since the date on which the company was entitled to commence business:—	Rs. ....
Estimated amount of preliminary expenses.	Name of promoter.
Amount paid or intended to be paid to any promoter.	Amount Rs. ....
Consideration for the payment.	Consideration.
Dates of, and parties to every material Contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement).	-----
Times and place at which the contracts or copies thereof may be inspected.	-----
Names and addresses of the auditors of the company.	-----
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a Director, or otherwise for services rendered by him or by the firm in connection with the promotion of the formation of the Company.	-----
If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirements shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	-----
(Signatures of the persons above named as directors or proposed directors or of their agents authorised in writing).	-----

**class**

**FORM A**

**Memorandum of Association of a Company Limited by Shares.**

2nd.—The registered office of the company will be situate in the province of Bombay.

3.—The objects for which the company is established are "the conveyance of passengers, and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees, divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
1. A.B. of , merchant ... ..	200
2. C.D. " , " ... ..	25
3. E.F. " , " ... ..	30
4. G.H. " , " ... ..	40
5. I.J. " , " — ... ..	15
6. K.L. " , " ... ..	5
7. M.N. " , " ... ..	10
<b>Total shares taken</b>	<b>325</b>

Dated \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Witness to the above signatures.

X. Y. of

**FORM B.**

(See sections 7 and 151)

**Memorandum and Articles of Association of a Company Limited  
by Guarantee, and not having a share capital.**

## MEMORANDUM OF ASSOCIATION

1st.—The name of the company is "The Mutual Calcutta Marine Association, Limited."



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2nd.— The registered office of the company will be situate in Calcutta

3rd.— The objects for which the company is established are "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.— The liability of the members is limited

5th.— Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

"1 A. B. of  
"2. C.D. of  
"3. E.F. of  
"4 G.H. of  
"5. I. J. of  
"6. K. L. of  
"7. M.N. of

Dated the                      day of  
Witness to be above signatures.  
X. Y. of

### **Articles of Association to accompany preceding Memorandum of Association**

#### **NUMBER OF MEMBERS**

1. The company for the purpose of registration is declared to consist of five hundred members.

2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

#### **DEFINITION OF MEMBERS**

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

#### **GENERAL MEETING**

4. The first general meeting shall be held at such time not being less than one month nor more than three months after the incorporation of the company and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default,

at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of general meeting being so held, a general meeting shall be held in the month next following and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above-mentioned general meeting shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting: if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

## PROCEEDINGS AT GENERAL MEETINGS.

10. Fourteen days' notice at the least specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say):—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned sine die.

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14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

### VOTES OF MEMBERS

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.

23. (1) No person shall act as a proxy, unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

Company, Limited,

I, \_\_\_\_\_, of \_\_\_\_\_, being a member of  
the \_\_\_\_\_ Company, Limited, hereby appoint \_\_\_\_\_ of  
\_\_\_\_\_ as my proxy, to vote for me and on my behalf at the  
[ordinary or extraordinary, as the case may be] general meeting of the company  
to be held on the \_\_\_\_\_ day of \_\_\_\_\_ and at any adjournment thereof.

Signed this \_\_\_\_\_ day of \_\_\_\_\_

## DIRECTORS

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

## POWERS OF DIRECTORS

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

## ELECTIONS OF DIRECTORS

28. The directors shall be elected annually by the company in general meeting.

## BUSINESS OF COMPANY

(Here insert rules as to mode in which business of insurance is to be conducted).

## AUDIT

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

## NOTICES

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

- " 1. A. B. of
- " 2. C. D. of
- " 3. E. F. of
- " 4. G. H. of
- " 5. I. J. of
- " 6. K. L. of
- " 7. M. N. of

Dated                      day of

19 .

Witness to the above signatures.

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## FORM C

(See section 7 and 151)

### Memorandum and Articles of Association of a Company Limited by guarantee, and having a share capital

#### MEMORANDUM OF ASSOCIATION

1st.—The name of the company is "The Snowy Range Hotel Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of Subscribers	Number of shares taken by each subscriber
" 1. A. B. of ... ..	200
" 2. C. D. of ... ..	25
" 3. E. F. of ... ..	30
" 4. G. H. of ... ..	40
" 5. I. J. of ... ..	15
" 6. K. L. of ... ..	5
" 7. M. N. of ... ..	10
Total shares taken ...	825

Dated the                      day of                      19                     

Witness to the above signatures.

X. Y., et

**Articles of Association to accompany preceding Memorandum of Association.** 1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, addresses and descriptions of Subscribers.

- "1. A. B. of , merchant
- "2. C. D. of
- "3. E. F. of
- "4. G. H. of
- "5. I. J. of
- "6. K. L. of
- "7. M. N. of

Dated                      day of                      19 .  
Witness to the above signatures.

X. Y., of

FROM D

(See sections 8 and 151)

**Memorandum and Articles of Association of an unlimited Company having a share capital.**

### MEMORANDUM OF ASSOCIATION

1st.—The name of the company is "The Patent Stereotype Company".

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the works of a patent method of founding and casting stereotype plates of which method P. Q. of Bombay, is the sole patentee"

We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we

respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of Subscribers							Number of shares taken by each subscriber
"1.	A. B. of	...	...	...	...	..	3
"2.	C. D. of	...	...	...	...	...	2
"3.	E. F. of	...	...	...	...	...	1
"4.	G. H. of	..	...	..	..	...	2
"5	I. J. of	...	...	...	...	...	2
"6	K. L. of	...	..	...	..	...	1
"7.	M. N. of	..	...	...	...	..	1
Total shares taken							12

Dated the                      day of                      19 .

Witness to the above signatures.

X. Y., of

#### Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.

2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

#### Names, Addresses and Descriptions of Subscribers.

"1. A. B. of                      , merchant  
 "2. C. D. of  
 "3. E. F. of  
 "4. G. H. of  
 "5. I. J. of  
 "6. K. L. of  
 "7. M. N. of

Dated the                      day of                      19

Witness to the above signatures.

X. Y., of

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## FORM E.

. As required by Part II of the Act.

(See Section 82.)

Summary of Share Capital and Shares of the                      Company, Limited,  
made up to the                      day of                      19                      (being the day of the first  
ordinary general meeting in 19                      ).

Nominal share capital Rs.	divided into*	{	shares of	Rs.	each.
		{	share of	Rs.	each.

Total number of shares taken up\* to the                      day of  
19 which number must agree with the total shown in the list }  
as held by existing members..                      .                      .                      . }

Number of shares issued subject to payment wholly in cash

Number of shares issued as fully paid up otherwise than in cash

Number of shares issued as partly paid up to the extent of  
per share otherwise than in cash                      .                      .                      .

† There has been called up on each—of shares                      .                      .                      Rs.

There has been called up on each—of shares                      ..                      .                      Rs.

There has been called up on each—of shares                      .                      .                      ..                      Rs.

† Total amount of calls received, including payments on applica- tion and allotment                      .                      .                      .                      .                      .	}	Rs.
---	---	-----

Total amount (if any) agreed to be considered as paid on shares } which have been issued as fully paid up otherwise than in cash	}	Rs.
---	---	-----

Total amount (if any) agreed to be considered as paid on shares } which have been issued as partly paid up to the extent of per share                      .                      .                      .                      .                      .	}	Rs.
--	---	-----

Total amount of calls unpaid                      .                      .                      .                      .                      Rs.

Total amount (if any) of sums paid by way of commission in } respect of shares or debentures or allowed by way of discount since date of last summary                      .                      .                      .                      .	}	Rs.
---	---	-----

Total amount (if any) paid on § shares forfeited                      .                      .                      Rs.

\*When there are shares of different kinds or amounts (e.g., Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately.

†Where various amounts have been called or there are shares of different kinds, state them separately.

‡Include what has been received on forfeited as well as on existing shares.

§State the aggregate number of shares forfeited.



Total amount of shares and stock for which share-warrants are outstanding ... ..	}	Rs.
---	---	-----

Total amount of share-warrants issued and surrendered respec- tively since date of last summary ... ..		Rs.
---	--	-----

Number of shares or amount of stock comprised in each share- warrant ..	}	Rs.
--	---	-----

Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act. .. ..	}	Rs.
--	---	-----

List of Persons holding shares in the \_\_\_\_\_ Company, Limited, on  
the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, and of persons who have held shares  
therein at any time since the date of the last return, showing the names and  
addresses and an account of the shares so held.

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Folio in register ledger containing particulars.			Names, Addresses and Occupations.		Account of Shares.		

\* State the aggregate number of shares forfeited (if any).

† The aggregate number of shares held, and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

† When the shares are of different classes, these columns may be sub-divided so that the number of each class held or transferred may be shown separately.

§ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

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Names and addresses of the persons who are the Directors of the  
, Limited, on the day of 19 .

Names	Addresses
<div></div>	<div></div>

Names and addresses of the persons who are the managers of the  
, Limited, on the day of 19 .

Names	Addresses
<div></div>	<div></div>

Note.—Banking companies must add a list of all their places of business.

I, , do hereby certify that the above list and summary  
truly and correctly states the facts as they stood on  
day of . 19 .

(Signature)

(State whether director, manager or secretary)

N.B. For Banking Companies see separate Form of Balance Sheet, under the Banking Act

**FORM F.**

**Form of Balance Sheet.**

(See Section 192)

LIMITED

Balance Sheet as at . . . 19

CAPITAL AND LIABILITIES	PROPERTY AND ASSETS
<p><b>Capital—</b>                      Authorised Capital shares of Rs each                      (Distinguishing between the various classes of Capital)</p>	<p><b>Fixed Capital Expenditure—</b>                      (Distinguishing as far as possible between expenditure upon goodwill, land, buildings, leaseholds, railway and other plant, machinery, furniture development of property, patents, trade marks and designs, interest paid out of Capital during construction, etc., and stating in every case the original cost and the additions thereto and deductions therefrom during the year and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance sheet after the first balance sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made.)</p>
<p><b>Issued Capital—</b>shares of Rs --each                      (i) Shares issued as fully paid up pursuant to any contract without payments being received in cash shares of Rs each                      (ii) Shares issued for payments in cash-- shares of Rs each</p>	
<p><b>Subscribed Capital</b> shares of Rs each                      Amount called up at Rs per share                      Less—Calls unpaid—                      (i) due from managing Agents                      (ii) due from others</p>	
<p><b>Add—</b>Forfeited share, (amount paid up)</p>	
<p><b>Note—</b>Where circumstances permit, issued and subscribed capital and amount called up may be shown as one item e.g. Issued and subscribed Capital shares of Rs each Rs .. paid up</p> <p><b>Reserves</b>                      Debentures stating the nature of security.</p>	<p><b>Preliminary Expenses.</b> ... ..  <b>Commission or Brokerage</b> ... ..                      (Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures until written off)  <b>Discount Allowed</b> on the issue of shares or so much as has not been written off at the date of the balance sheet.</p>

CAPITAL AND LIABILITIES		PROPERTY AND ASSETS	
Any sinking Fund. ....	...	Stores and spare Parts ...	...
Any other Fund Created out of Net Profits, including any development fund ...	...	Loose Tools ...	...
Any Pension or Insurance Fund ...	...	Live-Stock and vehicles ...	...
Provision for Bad and Doubtful Debts ...	...	Stock in Trade ...	...
		(Stating mode of valuation, e.g., cost or market value.)	...
<b>Loans—</b>		<b>Bills of Exchange</b> ...	...
(a) Secured—		<b>Book Debts</b> ...	...
(i) loans on mortgages or fixed assets ...	...	(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated.)	...
(ii) loans on debentures ...	...		...
(iii) loans from banks, stating the nature of security ...	...		...
(iv) liabilities to subsidiary companies ...	...		...
(v) other secured loans, stating the nature of security ...	...		...
(vi) interest accrued on mortgages, debentures or other secured loans ...	...		...
(b) Unsecured—		<b>Advances</b> ...	...
(i) loans from banks ...	...	(Recoverable in cash or in kind or for value to be received, e.g., Rates, Taxes, Insurance, etc., showing separately—	...
(ii) fixed deposits ...	...	(i) loans given to subsidiary Companies	...
(iii) short-term loans ...	...	(ii) loans including temporary advances made at any time during the year to directors or managers of the company)	...
(iv) advances by directors or managers and managing agents ...	...		...
(v) interest accruing but not due and interest accrued and due ...	...		...
(vi) liabilities to subsidiary companies ...	...		...
<b>Unclaimed Dividends</b>	...		...
<b>Liabilities—</b>		<b>Investments</b> ...	...
For Goods supplied ...	...	(Showing nature of investments and mode of valuation, e.g., Cost or Market value and distinguishing—	...
For Expenses ...	...		...
For Acceptances ...	...		...
For Other Finance ...	...		...

**CAPITAL AND LIABILITIES.**

**Advance payments and unexpired discounts**

(For the portion for which value has still to be given, e. g., in the case of the following classes of companies—

Newspaper, Fire Insurance, Theatre, Club, Banking, Steamship Companies, etc).

**Profit and Loss**

**Contingent Liabilities**

Claims against the company not acknowledged as debts

Money for which the company is contingently liable

(Showing separately the amount of any guarantees given by the company on behalf of directors or officers of the company.

Arrears of Cumulative Preference Dividends

**PROPERTY AND ASSETS**

(i) investments in Government or trust securities

(ii) investments in shares, debentures or bonds (showing separately shares fully paid up and partly paid up)

(iii) investments in shares, debentures or bonds of subsidiary companies

(iv) immovable properties

**Interest accrued on investments**

**Cash and other Balances**

Amount in hand

Balances with Agents and Bankers in detail showing whether on deposit or current account, etc.

**Profit and Loss**

(The information required to be given under any of the items or sub-items in this Form if not included in the Balance-sheet itself shall be furnished in a separate Schedule or Schedules to be attached to and to form part of the Balance-Sheet.)

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## FORM G

(See section 136)

### **Form of Statement to be published by Banking and Insurance Companies and Deposit, Provident, or Benefit Societies.**

"The share capital of the company is Rs.                      divided into                      shares  
of Rs.                      each

The number of shares issued is                      Calls to the amount of  
Rs.                      per share have been made, under which the sum of  
Rs.                      has been received.

The liabilities of the company on the thirty-first day of December (or thirtieth of June) were—

Debts owing to sundry persons by the company ;

Under decree, Rs.

On mortgages or bonds, Rs.

On notes, bills or hundis, Rs.

On other contracts, Rs.

On estimated liabilities, Rs.

The assets of the company on that day were :

Government securities (stating them), Rs.

Bills of exchange, hundis and promissory notes, Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

## FORM H .

(See section 277)

### **Information to be supplied in or in addition to the information contained in the Balance-Sheet of a Company referred to in Part X**

#### **Liabilities**

1. Summary of Authorised Share Capital and issued Share Capital.
2. Redeemable Preference Shares, stating date on or before which the shares are or are liable to be redeemed.
3. Debentures stating the nature of the Security.

---

\*If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

1. This Form was inserted by section 124 of the Indian Companies (Amendment) Act, 1986 (XXII of 1986).

4. Redeemed debentures which the Company has power to re-issue.
5. Loans:—
  - (a) Secured, stating the nature of security ;
  - (b) Unsecured.
6. Loans from Banks :—
  - (a) Secured, stating the nature of security ,
  - (b) Unsecured.
7. Profit and Loss Account, showing (unless disclosed in a separate account) :—
 

Balance as per previous Balance-Sheet.  
Appropriation thereof.  
Profit since last Balance-Sheet.

Where a Company is a holding company, a statement showing how and to what extent the losses, if any, of the subsidiary companies have been provided for either in the accounts of the subsidiary companies or of the holding company or of both.

If it is not possible to obtain such information a statement to that effect giving the reasons therefor.

Note: So far as a holding Company has any subsidiary Company or Companies operating in British India it shall disclose the particulars required under Section 132A in respect of such subsidiary company or companies.

8. Contingent Liabilities.
9. Arrears of Cumulative Preference Dividend.

## Assets

1. Fixed Assets, with sufficient particulars to disclose their general nature, and stating how their values are arrived at.
2. Preliminary expenses, so far as not written off.
3. Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off.
4. If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained.
- (5). Interest paid on Capital, so far as not written of, showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate.



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- (6). Discount allowed on Shares issued, so far as not written off.
- (7). Commission paid or allowed in respect of any shares or debentures, so far as not written off.
- (3). Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company.
- (9). Particulars showing :—
- (a) the amount of any loans which during the period to which the accounts relate have been made either by the company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period; and
  - (b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof; and
  - (c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the Company or by or from any subsidiary Company.

Note (1):—There shall not be required to be shown:—

- (a) in the case of a Company the ordinary business of which includes the lending of money, loans made by the Company in the ordinary course of its business; or
- (b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees.

Note (2):—The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

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